CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 356

INDIAN TERRITORY ILLUMINATING OIL COMPANY, PETITIONER,

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1932

CERTIORARI GRANTED DECEMBER 12, 1932

(37,053)

(37,053)

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in supreme court of Oklahoma	1	1
Citation and service (omitted in printing)	1	
Petition for appeal	2	1
Assignments of error and prayer for reversal	7	5
Order allowing appeal	11	8
Bond on appeal (omitted in printing)	13	
Stipulation as to transcript of record	15	9
Petition in error	16	10
Case-made from district court of Tulsa County	20	12
Caption	20	12
Journal entry of decision of Board of Equalization	21	13
Notice of appeal from Board of Equalization	24	15
Motion to dismiss	28	17
Demurrer	29	17
Stipulation and agreed statement of facts	30	18
Exhibit "A"—Oil and gas mining lease, July 9, 1924.	34	21

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1932

	Original	Print
Order overruling motion to dismiss and demurrer	47	29
Journal entry of judgment	48	30
Motion for new trial	51	31
Minute entry of order overruling motion for new trial	53	32
Order overruling motion for new trial	54	32
Statement as to transcript	56	33
Reporter's certificate (omited in printing)	57	
Clerk's certificate (omitted in printing)	58	
Certificate of counsel	59	34
Tender of case-made	60	34
Stipulation re case-made	61	35
Notice of settlement of case-made	62	36
Order settling case-made	63	36
Judgment	65	37
Opinion, Andrews, J	66	38
Petition for rehearing	72	43
Order denying rehearing	74	44
Order staying mandate (omitted in printing)	75	
Clerk's certificate (omitted in printing)	76	
Statement of points to be relied upon and designation of parts of record to be printed	77	45
Order allowing certiorari		49

[fols. a & 1] Citation, in usual form, showing service on W. L. Coffey and Hugh Webster, filed August 24, 1932, omitted in printing.

[fol. 2] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 21295

INDIAN TERRITORY ILLUMINATING OIL COMPANY, a Corporation, Appellant (and Defendant in Error Below),

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, Appellee (and Plaintiff in Error Below)

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA TO THE SUPREME COURT OF THE UNITED STATES—Filed Aug. 12, 1932

Comes now the Indian Territory Illuminating Oil Company, a corporation, defendant in error in the Supreme Court of the State of Oklahoma in the above entitled cause, which cause bears the number 21,295 in the said Supreme Court of the State of Oklahoma, and respectfully shows by this petition and the assignment of errors filed herewith that in the records, proceedings, decision and judgment of the Supreme Court of the State of Oklahoma, the same being the highest court of the State of Oklahoma in which a decision could be had in the suit, and the decision and judgment therein being final, manifest error has occurred greatly to the damage of this petitioner, whereby petitioner feels aggrieved.

That, as appears in the records and proceedings in this cause, the petitioner herein is preparing and filing with the County Assessor of Tulsa County, State of Oklahoma, its assessment list or schedule of property located in Tulsa [fol. 3] County, State of Oklahoma, did claim as property exempt from taxation by any ad valorem taxing agency within the State of Oklahoma, 51,630 barrels of crude oil,

which claim was by the said County Assessor overruled and denied. Whereupon the petitioner, as provided by the laws of the State of Oklahoma, appeared before the Board of Equalization of Tulsa County, Oklahoma, plaintiff in error in the Supreme Court of the State of Oklahoma in this cause, hereinafter referred to as plaintiff in error, and after a hearing the said plaintiff in error denied the claim of the petitioner and directed the County Assessor of Tulsa County, State of Oklahoma, to add the said 51,630 barrels of crude oil to the assessment roll of Tulsa County, State of Oklahoma, as assessable and taxable property of this petitioner for the year 1929. Thereafter the petitioner, in accordance with the laws of the State of Oklahoma, duly appealed to the District Court of Tulsa County, State of Oklahoma wherein a judgment was rendered in favor of this petitioner and wherein it was held that the said 51,630 barrels of crude oil was exempt from ad valorem taxation for the year 1929 and wherein the taxing officials of Tulsa County, State of Oklahoma, were ordered to strike and cancel said property from the tax rolls of said Tulsa County, Oklahoma. From such judgment the plaintiff in error, as further provided by the laws of the State of Oklahoma appealed to the Supreme Court of the State of Oklahoma. By the final decision of the said Supreme Court of the State of Oklahoma, it was held that the said District Court of Tulsa County, State of Oklahoma, erred in holding the said oil exempt from ad valorem taxation and the said judgment of the said district court was reversed, and the cause remanded with direction to the District Court to render judgment accordingly.

The final decision of the Supreme Court of the State of Oklahoma was made, rendered, and entered on the 17th day of May, 1932. Thereafter and on the 28th day of May, 1932, the petitioner filed a petition for rehearing, which petition for rehearing was denied by the said Supreme Court of the State of Oklahoma by an order made and entered on the 7th day of June, 1932.

[fol. 4] As also appears from the records and proceedings in this cause, the claim and contention that the said crude oil was exempt from and not subject to ad valorem taxation for the year 1929 by the State of Oklahoma or any political subdivision thereof, which claim and contention was made and urged throughout the entire proceedings above de-

scribed, was based upon the following facts: The said crude oil was produced by the petitioner under and pursuant to the terms of a mining lease held by the petitioner on lands located in Seminole County, State of Oklahoma, and owned by Seminole allottees, members of the Seminole tribe of Indians, as their individual allotments and restrictions against alienation of the said land imposed by Acts of Congress had not been removed. The said lease so held by the petitioner was executed by the said allottees on their said allotments and was approved by the Secretary of the Interior pursuant to the authority of an Act of Congress approved May 27, 1908 (35 Stat. at L. 312). The said oil so produced by the petitioner had not been disposed of by the petitioner from the time of production thereof until and throughout the entire tax period in question but was owned and held in storage in its original state throughout and during the entire tax period in question by the petitioner as lessee under said lease.

As further appears from the records and proceedings in this cause there was drawn in question the validity of certain statutes of the State of Oklahoma and authority exercised thereunder on the ground of their being repugnant to the Constitution, treaties, and laws of the United States and the final decision in this cause by the Supreme Court of the State of Oklahoma was in favor of their validity, the said statutes of the State of Oklahoma being Sections 9574 and succeeding sections of Chapter 84 Compiled Oklahoma Statutes 1921, particularly sections 9814, 9627 and 9614 which provide for the assessment, levy and collection by the State of Oklahoma and the political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma during any given tax year including crude petroleum produced from the allotment of a restricted Seminole Indian in Seminole County, Oklahoma, by a lessee under a lease executed by such restricted allottee and duly approved by the Secretary of the Interior, and while the oil [fol. 5] so produced by said lessee under said lease is still owned and held in storage in its original state and not disposed of by said lessee.

And as further appears in the records and proceedings in this cause there was drawn in question the validity of certain statutes of an authority exercised under the United

States and the final decision of the Supreme Court of the State of Oklahoma in this cause was against their validity; and likewise in said cause as appears from the records and proceedings therein rights, privileges and immunities were specially set up and claimed by this petitioner under the Constitution of the United States, a Treaty of the United States with the Seminole Nation of Indians, and certain Statutes of the United States and the final decision of the Supreme Court of the State of Oklahoma in this cause is against and denies such rights, privileges and immunities. The said Statutes of the United States above referred to are as follows: 30 Stat. at L. 567 (the Act ratifying the agreement between the Dawes Commission and the Seminole Nation of Indians which, among other things, provided for the allotments to members of the Seminole Nation of Indians); 34 Stat. at L. 137, 144, 35 Stat. at L. 312, 45 Stat. at L. 495 (imposing restrictions upon the alienation of lands allotted to the Seminole allottees and providing for the leasing thereof with the approval of the Secretary of the Interior); and 34 Stat. at L. 367 (the Enabling Act which provides that nothing in the Constitution of the State of Oklahoma shall be construed to limit or impair the rights of persons or property pertaining to the Indians of the Territory of Oklahoma and of the Indian Territory or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if the said Act had not been passed.)

[fol. 6] Petitioner further represents that the said decision and judgment of the Supreme Court of the State of Oklahoma was erroneous in holding and deciding that the crude oil above described was subject to ad valorem taxation for the year 1929 by the State of Oklahoma and its political subdivisions, and in reversing the judgment of the said District Court of Tulsa County, Oklahoma, and that the said decision and judgment of the Supreme Court of the State of Oklahoma is contrary to and in violation of the Treaty and Statutes of the United States hereinbefore referred to and the Constitution of the United States.

Petitioner, by reason of the errors above indicated and more fully set out in the assignment of errors filed herewith

desires to avail itself of the law and practice in such cases made and provided by appeal to the Supreme Court of the United States.

Wherefore petitioner prays for the allowance of an appeal from the Supreme Court of the State of Oklahoma to the Supreme Court of the United States and for such other and further process and proceedings as will enable this petitioner to obtain a review of the case and a correction of said errors by the Supreme Court of the United States, and also prays that an order be made fixing the amount of the security which petitioner as appellant shall give and furnish upon appeal and that upon the giving of said security all further proceedings in the Supreme Court of the State of Oklahoma be suspended and stayed until the determination of said appeal by the Supreme Court of the United States; and that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of the State of Oklahoma, may be sent to the Supreme Court of the United States.

John H. Miley, Wm. P. McGinnis, Counsel for Petitioner, Indian Territory Illuminating Oil Company.

[fol. 7] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Aug. 12, 1932

Assignment of Errors

Comes now the Indian Territory Illuminating Oil Company, a corporation, the defendant in error in the Supreme Court of the State of Oklahoma in the above cause and the petitioner for an appeal herein, and respectfully shows that in the opinion and judgment of the Supreme Court of the State of Oklahoma in said cause, manifest errors were committed to its prejudice, which are apparent in the record and proceedings therein; that the errors committed by the Supreme Court of the State of Oklahoma in its opinion

and judgment in said cause are more fully and particularly set forth as follows:

1. The Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Tulsa County, Oklahoma, and in holding and deciding that the said District Court of Tulsa County, Oklahoma, erred in holding that the property sought to be taxed in this cause was not subject to ad valorem taxation for the year 1929 by the State of Oklahoma or any political subdivision [fol. 8] thereof.

2. The Supreme Court of the State of Oklahoma erred in refusing to affirm the judgment of the District Court of Tulsa County, Oklahoma.

3. The Supreme Court of the State of Oklahoma erred in holding, deciding and determining that Section 9574 and succeeding sections of Chapter 84 Compiled Oklahoma Statutes 1921, particularly Sections 9814, 9627 and 9614, which provide for the assessment, levy and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma during any given tax year are valid when applied to crude petroleum produced from the allotment of a restricted Seminole Indian in Seminole County, Oklahoma, by a lessee under a lease executed by such restricted allottee and duly approved by the Secretary of the Interior, and while the oil so produced is still owned and held in storage in its original state and not disposed of by said lessee and in rendering a decision in favor of the validity of said Statutes when applied to and construed to cover the property sought to be taxed in this cause, and in not holding under the facts in this cause that said Statutes as so applied are repugnant to the Constitution, Treaties and Laws of the United States.

4. The Supreme Court of the State of Oklahoma erred in holding, deciding, and determining that the acts of the County Assessor, the County Treasurer and the Board of Equalization of Tulsa County, Oklahoma, and the authority exercised by them and each of them under and — the authority conferred and vested in them by the said Statutes of the State of Oklahoma mentioned specifically in

assignment number 3 herein and above set forth, and other [fol. 9] statutes of the State of Oklahoma authorizing the assessment of an ad valorem tax on the property involved in this cause for the period in question are valid, and in rendering a decision in favor of their validity and in not holding said Statutes and the authority so exercised by the officials aforesaid under said Statutes repugnant to the Constitution, Treaties and Laws of the United States.

5. The Supreme Court of the State of Oklahoma erred in sustaining the above mentioned Statutes of the State of Oklahoma, authorizing the assessment, levy and collection of ad valorem tax on the crude oil involved in this case, said crude oil being held in storage, unsold and in its original state throughout and during the entire tax period in question by the petitioner herein, and said crude oil having been by the petitioner produced solely under an oil and gas lease upon restricted Seminole lands under the control of Congress and the Secretary of the Interior.

6. The Supreme Court of the State of Oklahoma erred in its decision denying that the said crude oil produced by the petitioner is and was exempt from ad valorem taxation as claimed by it under the Constitution, Treaties and Laws of the United States.

Prayer for Reversal

For which errors the Indian Territory Illuminating Oil Company, defendant in error in the Supreme Court of the State of Oklahoma in this cause and petitioner for an ap- [fol. 10] peal herein, prays that the judgment and decision of the Supreme Court of the State of Oklahoma in this cause be reversed and that the said Supreme Court of the State of Oklahoma be directed to affirm the judgment of the District Court of Tulsa County, Oklahoma as rendered in said cause and for such other and further relief as to the Court may seem just and proper and for its costs.

John H. Miley, Wm. P. McGinnis, Counsel for Petitioner, Indian Territory Illuminating Oil Company.

[fol. 11] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER ALLOWING APPEAL—Filed Aug. 12, 1932

The Indian Territory Illuminating Oil Company, a corporation, defendant in error in the Supreme Court of the State of Oklahoma in the above entitled cause, which cause bears the number 21,295 in the said Supreme Court of the State of Oklahoma, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the opinion and judgment made and entered in the said cause by the Supreme Court of the State of Oklahoma on the 17th day of May, 1932, and having presented and filed their petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma, as prayed in said petition and as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Oklahoma shall prepare and certify a transcript of the record, proceedings, opinion and judgment in said cause and transmit the same to the Supreme Court of [fol. 12] the United States, so that he shall have the same in the said Supreme Court of the United States within thirty days from the date hereof.

And it is further ordered that the bond on appeal be fixed in the sum of Five Hundred and no/100 ($500.00) dollars and that upon the said Indian Territory Illuminating Oil Company, a corporation, filing a bond in the said sum, with sufficient surety, and conditioned as required by law, the same shall operate as a supersedeas of the opinion and judgment made and entered in the said cause, and shall suspend and stay all further proceedings in the Supreme Court of the State of Oklahoma until the final determina-

tion of said appeal by the Supreme Court of the United States.

Dated August 12th, 1932.

E. F. Lester, Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

Gus Pool, Clerk Supreme Court of Oklahoma, by Reuel Haskell, Jr., Deputy. (Seal Supreme Court of the State of Oklahoma.)

[fols. 13 & 14] Bond on appeal for $500.00, approved and filed August 12, 1932, omitted in printing.

[fol. 15] [File endorsement omitted]

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD—Filed Aug. 24, 1932

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the transcript of record to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include the following:

1. Petition in Error, together with Case-Made attached thereto.
2. Opinion of the Supreme Court of the State of Oklahoma herein, together with a showing of the filing and entry thereof.
3. Petition for Rehearing.
4. Order of the Supreme Court of the State of Oklahoma overruling and denying Petition for Rehearing, together with a showing of the filing and entry thereof.
5. Petition for Appeal from the Supreme Court of the State of Oklahoma to the Supreme Court of the United States.
6. Assignment of Errors.

7. Order Allowing Appeal to the Supreme Court of the United States, and Fixing Amount of Bond.
8. Copy of Citation and Acknowledgment of Service Thereof.
9. Bond, together with Approval Thereof.
10. This Stipulation.

Dated August —, 1932.

W. L. Coffey, County Attorney; Hugh Webster, Asst. County Atty., Attorney- for Plaintiff in Error and Appellee. John H. Miley, Wm. P. McGinnis, Attorneys for Defendant in Error and Appellant.

[fol. 15½] [File endorsement omitted.]

[fol. 16] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION IN ERROR—Filed May 2, 1930

The said Board of Equalization of Tulsa County, Oklahoma, plaintiff in error, complains of said defendant in error, for that the said Indian Territory Illuminating Oil Company, a corporation, at the November, 1929, term of the District Court of Tulsa County, State of Oklahoma, recovered a judgment by the consideration of said Court against the said Board of Equalization of Tulsa County, Oklahoma, in a certain action then pending in the said Court, wherein the said Indian Territory Illuminating Oil Company, a corporation, was appellant and the Board of Equalization of Tulsa County, Oklahoma, was appellee, said cause being an appeal from the said Board of Equalization of Tulsa County, Oklahoma, in a matter pertaining to the assessment of the personal property of said Indian Territory Il-
[fols. 17-19] luminating Oil Company, as found and fixed by the said Board of Equalization for the year 1929. The original case made duly signed, attested and filed, and a certified transcript of the record of said Court is hereunto

attached, marked Exhibit "A", and made a part of this petition in error; and the said Board of Equalization of Tulsa County, Oklahoma, avers that there is error in the said record and proceedings in this, to-wit:

1. Said Court erred in overruling the motion of Plaintiff in Error for a new trial.

2. Said Court erred in rendering judgment for the defendant in error and against the plaintiff in error.

3. Said Court erred in holding and deciding that defendant in error's property is exempt from taxation.

4. Said Court erred in ordering and directing the taxing officials of Tulsa County, Oklahoma, to strike and cancel defendant in error's property from the tax rolls for the year 1929.

5. Said Court erred in overruling the motion of plaintiff in error to dismiss defendant in error's appeal.

6. Said Court erred in overruling plaintiff in error's demurrer to defendant in error's appeal.

Wherefore plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiff in error and against the defendant in error, upon the evidence, and that the plaintiff in error be restored to all rights that he has lost by the rendition of such judgment, and for such other and further relief as to the Court may seem just.

Byron Kirkpatrick, County Attorney; Hugh Webster, Assistant County Attorney, Attorneys for Plaintiff in Error.

[fol. 20] IN DISTRICT COURT OF TULSA COUNTY

In re Protest of the INDIAN TERRITORY ILLUMINATING OIL COMPANY on Assessment of Personal Property in Tulsa County, Oklahoma, for the Year 1929

No. 45612

INDIAN TERRITORY ILLUMINATING OIL COMPANY, a Corporation, Appellant,

vs.

THE BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, Appellee

Case-made

Be it remembered that heretofore, and on the 2nd day of July, A. D., 1929, the Indian Territory Illuminating Oil Company, a corporation, named as Appellant above, filed in the office of the Court Clerk within and for Tulsa County, Oklahoma, in District Court, a certified copy of Journal Entry of the action of the Board of Equalization in and for Tulsa County, Oklahoma, on a certain proceedings had before said Board, together with a certified copy of Notice of Appeal showing service upon D. A. Rowe, County Assessor, and O. G. Weaver, County Clerk, of Tulsa, Tulsa County, Oklahoma, which instruments, together with, and attached to the "Certification" referring thereto, are in the words and figures following, to wit:

[fol. 21] Certification

45612

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, D. A. Rowe, do hereby certify:

That I am the duly elected, qualified and acting County Assessor of and for Tulsa County, State of Oklahoma, and by virtue of my election as such officer I am ex officio Secretary of the County Equalization Board of Tulsa County, State of Oklahoma.

As such Secretary I state that on the 5th day of June, 1929, at a regularly called and published meeting of the Board of Equalization in and for said County, the Indian Territory Illuminating Oil Company appeared by its Agent and Attorney, W. M. Plake, to protest the valuation placed on personal property owned by said company in said Tulsa County, upon his notice heretofore given to said Board.

That upon consideration of the arguments of said W. M. Plake, the said Board of Equalization overruled the protest and objections of said Indian Territory Illuminating Oil Company; denied the prayer for relief requested by objector and instructed the County Assessor of Tulsa County to add the property in dispute to the Assessment Roll of Tulsa County as being taxable property of the said Indian Territory Illuminating Oil Company in said County for the year 1929.

That the attached Journal Entry, Notice of Appeal and Notice of Protest are all the pleadings filed before said Board of Equalization and contain a statement and resume of all proceedings had and done before said Board on said date.

[fol. 22] Witness my hand this 2 day of July, 1929.

D. A. Rowe.

BEFORE BOARD OF EQUALIZATION OF TULSA COUNTY

45612

In the Matter of the Protest of INDIAN TERRITORY ILLUMINATING OIL COMPANY on Assessment of Personal Property for ad Valorem Taxation for the Year 1929

JOURNAL ENTRY OF DECISION

Now on this 5th day of June, 1929, the above-entitled matter came regularly on for hearing, said Board of Equalization in and for Tulsa County, Oklahoma, being in regular session, and said Indian Territory Illuminating Oil Company having been cited to appear before said Board on said date: Present, all members of the Board of Equalization, the County Assessor as ex-officio, Secretary of said Board, and Indian Territory Illuminating Oil Company, by W. M. Plake, its agent and attorney.

Whereupon said Board directs said Indian Territory Illuminating Oil Company to show cause why its personal property located in said Tulsa County, Oklahoma, should not be raised from $116,886.87 to $187,717.97 by the incorporation in said Assessment Roll for the year 1929, items as follows, to wit:

[fol. 23] 4 55,000 bbl. steel storage tanks, value $22,000.00.

51,630 bbls. crude oil, gravity 38.2, value $50,081.10.

Located in Red Fork Township, School District 22, Tulsa County, Oklahoma, which said Company shows on its return and claims exempt from taxation. And thereupon, attorney for said Company presents his arguments and authorities, and the said Board, being advised in the premises, finds:

That the items of (4) four 55,000-bbl. steel storage tanks, of the assessed valuation of $22,000.00, and the 51,630 bbls. crude oil, of the assessed valuation of $50,081.10, claimed exempt from taxation by said Indian Territory Illuminating Oil Company should be added to the assessment roll of said Tulsa County, as assessable property of said Company, and that the County Assessor of said Tulsa County should be ordered and directed to add said property, so claimed exempt, to said assessment roll.

It is therefore by said Board of Equalization ordered that the protest and objection of said Indian Territory Illuminating Oil Company to the addition of said above-described property to said assessment roll of Tulsa County, Oklahoma, be overruled; that the claim by said Company of exemption from taxation of said property be denied; that the County Assessor of Tulsa County, Oklahoma, shall add said property above described to the assessment roll of Tulsa County, Oklahoma, as assessable and taxable property of said Indian Territory Illuminating Oil Company for the year 1929; whereupon in compliance with such order, the County Assessor did then and there add [fol. 24] such property to said assessment roll as taxable property of said Indian Territory Illuminating Oil Company, for the year 1929.

To all of which rulings, orders and decision of said Board, the said Indian Territory Illuminating Oil Company then

and there excepts and objects, and gives notice of appeal to the District Court of Tulsa County, Oklahoma.

Dated the day and year first above written.

W. W. Stuckey, Chairman Board of Equalization in and for Tulsa County, Oklahoma.

Attest:

D. A. Rowe, County Assessor, Tulsa County, Oklahoma, ex-officio Secretary Equalization Board.

BEFORE BOARD OF EQUALIZATION OF TULSA COUNTY

NOTICE OF APPEAL

To the Honorable County Assessor and County Clerk of Tulsa County, Oklahoma:

You are hereby notified that the Indian Territory Illuminating Oil Company, of Bartlesville, Oklahoma, intends to, and does hereby, appeal to the District Court of Tulsa County, Oklahoma, from the orders, rulings and decision of the Honorable Board of Equalization of Tulsa County, Oklahoma, overruling the protest and objection of the Indian Territory Illuminating Oil Company in the matter of [fol. 25] the assessment for ad valorem taxes for the year 1929, on the personal property of said Indian Territory Illuminating Oil Company, located in Red Fork Township, School District 22, Tulsa County, Oklahoma, for and on account of the following reasons, to wit:

That the item of four (4) 55,000 barrel steel storage tanks, of the assessed value of $22,000.00, are claimed to be exempt from taxation on ad valorem basis, for the reason that the said tanks are items of property indispensably used in the production and marketing of crude oil produced by said Indian Territory Illuminating Oil Company, and as such indispensable and necessary items of equipment, are exempt from ad valorem taxation under Paragraph 5, Section 9814, C. O. S. 1921.

That the item of 51,630 barrels of crude oil in storage, of 38.2 gravity, produced from lands owned by restricted Indians, of the assessed value of $50,081.10, is not subject to ad valorem taxation in said County, for the reasons:

(a) That Indian Territory Illuminating Oil Company, in the producing of said oil, was operating as a governmental instrumentality, and under the Acts of Congress and the decisions of the United States Supreme Court, said product so produced, is not taxable by the State of [fol. 26] Oklahoma, or any of its political or municipal subdivisions.

(b) That said oil constitutes, as to Indian Territory Illuminating Oil Company, income derived from a restricted source, and as such income, under the Acts of Congress and the decisions of the United States Supreme Court, such property is not taxable by the State of Oklahoma, or any of its political or municipal subdivisions.

That Indian Territory Illuminating Oil Company, by and through its agent and attorney, appeared before the Honorable Board of Equalization of Tulsa County, Oklahoma, on the 5th day of June, 1929, and urged upon said Board the exemptions claimed as above set forth, for the reasons hereinabove set forth, and upon the presentation of arguments and authorities by said Indian Territory Illuminating Oil Company and by representatives of said Tulsa County, said Board did, on said 5th day of June, 1929, overrule the contention, protest and objection of said Indian Territory Illuminating Oil Company, and ordered and directed the County Assessor of Tulsa County, Oklahoma, to add the above-described property to the Assessment Roll for said County for the year 1929 as assessable property of said Indian Territory Illuminating Oil Company, which was accordingly done by said County Assessor, to which order, ruling and decision of said Board, the Indian Territory [fol. 27] Illuminating Oil Company then and there excepted, and gave notice of appeal to the District Court of Tulsa County, Oklahoma.

Wherefore take notice that said Indian Territory Illuminating Oil Company prosecutes its appeal to said District Court of Tulsa County, Oklahoma.

Dated this 2 day of July, 1929.

Indian Territory Illuminating Oil Company, by Fred M. Carter, C. E. Wilhite, W. M. Plake, Its Attorneys.

Service of the above and foregoing notice of appeal and receipt of a copy thereof is hereby acknowledged on this 2 day of July, 1929.

D. A. Rowe, County Assessor, Tulsa County, Oklahoma. O. G. Weaver, County Clerk, Tulsa County, Oklahoma.

[File endorsement omitted.]

[fol. 28] In District Court of Tulsa County

[Title omitted]

Motion to Dismiss Appeal—Filed Nov. 26, 1929

Comes now the appellee, Board of Equalization of Tulsa County, Oklahoma, and moves the dismissal of appellant's pretended appeal for the following reason:

That said pretended appeal was not taken, made and perfected in the manner and form provided by law.

Byron Kirkpatrick, County Attorney; Hugh Webster, Assistant County Attorney, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 29] In District Court of Tulsa County

[Title omitted]

Demurrer—Filed Nov. 26, 1929

Comes now the appellee, Board of Equalization of Tulsa County, Oklahoma, and demurs to the appellant's complaint filed herein, for the reason that the said complaint does not state facts sufficient to constitute a cause of action in favor of said appellant, and against appellee under the laws of the State of Oklahoma, and does not entitled appellant to the relief asked for.

Byron Kirkpatrick, County Attorney; High Webster, Assistant County Attorney, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 30] IN DISTRICT COURT OF TULSA COUNTY

[Title omitted]

STIPULATION AND AGREED STATEMENT OF FACTS—Filed Nov. 26, 1929

Comes now the Indian Territory Illuminating Oil Company as appellant, by its attorneys Fred M. Carter and C. E. Wilhite, and the Board of Equalization of Tulsa County, Oklahoma, as appellee, by the County Attorney of said County; and the said appellee reserving the right at the time of trial to move the dismissal of this appeal, and to demur to appellant's complaint, hereby stipulate and agree that if the Court overrules appellee's motion to dismiss and its demurrer to appellant's complaint, the following [fol. 31] statement contains and shall constitute the statement of facts in the above entitled matter, and that the Court may enter judgment accordingly the same as if such facts hereinafter recited had appeared from the evidence and testimony adduced in open court in due and regular manner upon the trial of said cause, the parties hereto reserving the right to except to the rulings, orders and judgment of the Court:

1. That the Indian Territory Illuminating Oil Company is a corporation organized under the laws of the State of Delaware, existing and doing business under the laws of the state of Oklahoma, and engaged in the production and marketing of crude oil, and that for the purposes of this hearing the said Indian Territory Illuminating Oil Company, a corporation, shall be designated as appellant, and the Board of Equalization of Tulsa County, Oklahoma, designated as appellee.

2. That appellant, on the 8th day of April, 1929, in due time, prepared and filed with the County Assessor of Tulsa County, Oklahoma, its assessment list or schedule, wherein was incorporated, among other items of property, the following, to wit: 4 55,000 bbl. steel storage tanks; 51,630 bbls. crude oil, located in School District No. 22, Red Fork Township, Tulsa County, Oklahoma, and notation made in and on said return and as a part thereof, that appellant deemed said property exempt from taxation, and claimed

exemption from taxation on said property in said county, by any ad valorem taxing agency within the State of Oklahoma.

3. That the claim of appellant relative to exemption from taxation of the storage tanks and crude oil above designated was by the County Assessor of Tulsa County, Oklahoma, denied and said Assessor did, on the 8th day of April, 1929, add said property to the assessment list of property belonging to this appellant, and assessed the value of said property in the following sums, to wit: 4 55,000 bbl. steel [fol. 32] storage tanks, $22,000.00; 51,630 bbls. crude oil, $51,081.10.

4. That on the 5th day of June, 1929, appellant appeared before the Board of Equalization of Tulsa County, Oklahoma, with the intent and for the purpose of having said property above described stricken from the assessment list of property belonging to appellant; that on said day, said Board heard and considered the evidence adduced by appellant and argument of counsel in support thereof, and did, upon consideration thereof, deny the claim of appellant, and sustained the action of the County Assessor of Tulsa County, Oklahoma, in placing said property on the Assessment List of said appellant.

5. That appellant gave notice of appeal from the action and decision of the Board of Equalization of Tulsa County, Oklahoma, and that the County Assessor of Tulsa County, Oklahoma, as Secretary of said Board, pursuant to said notice of appeal, has certified the proceedings had and done before said Board to this Court.

6. That the storage tanks mentioned above and complained of herein, and on account of which appearance was had before the Board of Equalization and appeal therefrom lodged in this Court, contained on January 1, 1929, approximately 172,747 bbls. of oil produced by appellant from producing leasehold estates located in Seminole County, Okahoma, which were (1) commercial leasehold estates, which is to say, fee simple, or those on which no restrictions of any nature have been, or are now imposed, or if imposed, have been removed by the proper authority, and (2) restricted leasehold estates, which is to say, leases or lands owned by restricted Indians on which lands such re-

strictions have been, and are now imposed by Acts of Congress. But that except as advised by appellant, the Assessor and the Board of Equalization of Tulsa County, Oklahoma, had no way of knowing from where or from what leases said oil was produced. That on the oil produced from the "commercial leasehold estates" a gross production tax has been paid by appellant, as provided by Sec. 9814, C. O. S. 1921; that on all oil produced from the "restricted leasehold estates" no gross production tax has been paid, this being the oil which appellant here seeks to be exempted from ad valorem tax in Tulsa County, Oklahoma; that the four storage tanks and the 51,630 bbls. of [fol. 33] crude oil above mentioned and involved herein were assessed for the year 1929 and subjected to a mill rate levy of 34.05 mills on the dollar valuation for State, County, School District and Township taxes, but that no ad valorem tax has been paid thereon.

7. That of the oil produced by appellant and stored in the tanks above described, 51,630 bbls. of said oil was produced by appellant from lands located in Seminole County, Oklahoma, owned by Indians whose restrictions against alienation have never been removed, copy of the lease under which appellant operated and produced the oil herein involved, and of which lease appellant was assignee, is hereto attached, marked "Exhibit A", hereby referred to and made a part hereof. But that except as advised by appellant, the Assessor and Board of Equalization of Tulsa County, Oklahoma, has no way of knowing what amount of said oil in storage, if any, was produced by appellant from restricted leasehold estates. That said oil was produced during the period from March 31, 1927, to June 16, 1927, and commingled and intermingled at the time and place of production with oil from the "Commercial leasehold estates" in Seminole County, Oklahoma, and immediately piped into storage tanks located in Tulsa County, Oklahoma, where it has remained in storage since 1927. That the oil from the restricted leasehold estate comprised approximately 30% of the entire amount of oil produced as determined by gauges at the wells.

8. That the steel storage tanks above mentioned are located in Tulsa County, Oklahoma, and became the property of appellant on the 14" day of March, 1927, and were

acquired for the purpose of storing oil produced by it, and such tanks are now, and were on January 1, 1929, owned by appellant. These tanks are not on any of the leaseholds from which any of the oil was produced, nor is it contended that they are on "restricted leasehold estates."

9. That pursuant to the terms of the Departmental Lease, copy of which is attached hereto as Exhibit "A", appellant as lessee paid or caused to be paid to the Superintendent of the Five Civilized Tribes, Muskogee, Oklahoma, for the said lessors, as royalty, the sum of 12½% of the gross proceeds of all crude oil extracted from said land, said [fol. 34] payment being made at the time of removal of the oil. That said Indians and lessors owned no part of the oil in storage on January 1, 1929, nor will they receive any part of the proceeds of same when sold or disposed of by appellant.

Indian Territory Illuminating Oil Company, Appellant, by C. E. Wilhite, Its Attorney. Board of Equalization of Tulsa County, Oklahoma, Appellee, by Byron Kirkpatrick, County Attorney; High Webster, Assistant County Attorney.

EXHIBIT "A" TO STIPULATION

Form A, Series 1908, Approved April 20, 1908. Amended February 6 and June 29, 1911. 27482.

Oil and Gas Mining Lease upon Land Selected for Allotment

Book 184, Page 62

Seminole Nation, Oklahoma

This Indenture of Lease, Made and entered into in quadruplicate on this 9th day of July, A. D., 1924, by and between J. L. Hull, Guardian of Willie Harjo, a minor, of Seminole, Okla., Leah Larney nee Harjo of Sasakwa, Okla., and Molly Anna Harjo, and enrolled fullblood Seminole Citizen, Roll No. 966 of Seminole, Okla., the said Willie

[fol. 35] Harjo and Leah Larney nee Harjo being the sole surviving issue born since March 4, 1906, and said Molly Anny Harjo being the surviving widow of Tolof Harjo, deceased, who was a full blood citizen of the Seminole Nation, Roll No. 935, party of the first part, hereinafter designated as lessor, and B. V. Pipkin, of Seminole, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Act of Congress approved May 27, 1908 (35 Stat. L. P. 312), witnesseth:

1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained and hereby agreed to be paid, observed and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following described tract of land lying within the county of Seminole and state of Oklahoma, to wit: The Southeast Quarter of the Southeast Quarter (S. E. ¼ of S. E. ¼) same being the homestead allotment of Tolof Harjo, deceased, Seminole Roll No. 935, of Section 23, Township 9 N. Range 6E, of the Indian Meridian, and containing forty (40) acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much, only [fol. 36] of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells, or other sources on said lands by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and also the right to use free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the Superintendent of the Five Civilized Tribes, Muskogee, Oklahoma, for the lessor, as royalty, the sum of 12½ per cent. of the gross proceeds of all crude oil extracted

from said land, such payment to be made at the time of sale or removal of the oil. And the lessee shall pay as royalty on each gas producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of ultilization; provided, however, in the case of gas wells of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty, which will become effective as a part of this lease; provided, further, That in case of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the [fol. 37] lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises, provided there shall be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas producing well, which cannot profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas producing privileges, the lessee shall pay a rental of one hundred dollars per annum in advance, calculated from date of discovery of gas, on each gas producing well, gas from which is not marketed or not utilized otherwise than for operations under this

Book 184, Page 63:

lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to said Superintendant for the Five Civilized Tribes, Muskogee, Okla-

homa, for lessor, as advance annual royalty, from the date of the approval of this lease, fifteen cents per acre per [fol. 38] annum, annually in advance for the first and second years; thirty cents per acre per annum, annually, in advance, for the third and fourth years; seventy-five cents per acre per annum, annually, in advance, for the fifty year; and one dollar per acre per annum, annually, in advance, for each succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit on stipulated royalties, and the lessee hereby agrees that said advance royalty when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation thereof; nor shall the lessee be relieved from its obligation to pay said advance royalty annually when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease and shall drill at least one well thereon within one year from the date of approval of this lease by the Secretary of the Interior, or shall pay to said Superintendant for the Five Civilized —, Muskogee, Oklahoma, for the use and benefit of the lessor, for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other considerations named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender [fol. 39] this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed as provided herein, shall be a violation of one of the material and substantial terms and conditions of this lease,

and be cause for cancellation of such lease under paragraph numbered 9 hereof; but such cancellation shall not in any wise operate to release or relieve the lessee from the covenant and obligations to pay such rental, or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such officer as may be designated by him for the purpose to drill and operate wells to offset wells on adjoining tracts and within three hundred feet of the dividing line, or in case of gas wells lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be offset if said wells had been drilled and were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled or royalty paid in lieu of drilling, within ten days after the [fol. 40] lessee is notified to do so, and failure to comply with such requirements shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, excepting tools, derricks, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells which shall remain the property of the lessee, and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and not permit any nuisance to be maintained on the premises under lessee's control nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purpose than those authorized in the lease; and before abandoning any well shall securely plug the same so as to

effectually shut off all water from the oil-bearing stratum, [fol. 41] or in the manner required by the laws of the state of Oklahoma.

6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all improvements, tools, movable machinery, and all other personal chattels used in operating said property and also upon all of the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may at any time, by paying to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, all amounts then due as provided herein and the further sum of one dollar, surrender and cancel this lease and be relieved from all further obligations or liability thereunder; provided, if this lease has been recorded lessee shall execute a release and record the same in the proper county recording office; provided, further, in event restrictions are removed from all leased premises, the lessee may surrender all the undeveloped portion thereof by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms hereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells, and execute and record a cancellation of premises surrendered.

8. This lease shall be subject to the regulations of the [fol. 42] Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease; provided, however, that no regulations made after the approval of this lease, affecting either the length of term of oil and gas leases, the rates of royalty or payment thereunder, or the assignment of leases, shall operate to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof) shall have the right at any time after

thirty days' notice to the lessee specifying the terms or conditions violated, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

10. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, and such further bond or bonds as may be required by said Secretary, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian office.

11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of [fol. 43] the covenants and conditions of this lease.

12. In event restrictions on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns at the First State Bank of Seminole, Okla., or such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

14. In Witness Whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

[fol. 44] J. L. Hull, Guardian Willie Harjo Minor. (Seal.) Mollie Anna Harjo. (Seal.) Leah Larney Nee Harjo. (Seal.) B. V. Pipkin.

Two witnesses to execution by lessor:

B. H. McKellop, P. O. Wewoka, Okla. M. W. Janes, P. O. Seminole, Oklahoma.

Two witnesses to execution by lessee:

Elizabeth Powell, P. O. Seminole, Oklahoma. M. W. Janes, P. O. Seminole, Oklahoma.

Approved in open Court this the 9th day of July, 1924.

Thos. O. Criswell. (Seal.)

Book 184, page 65:

STATE OF OKLAHOMA,
County of Seminole, ss:

Before me, a Notary Public in and for said County and State, on this 9th day of July, 1924, personally appeared J. L. Hull, Guardian of William Harjo, a Minor, Leah Larney nee Harjo, and B. V. Pipkin, to me known to be the identical persons who executed the within and foregoing lease by their respective signatures and also Molly Anna Harjo, to me known to be the identical person who executed the within and foregoing lease, by her mark, in my presence and in the presence of B. H. McKellop and M. W. Janes as witnesses, and acknowledged to me that they executed [fol. 45] the same as their free and voluntary act and deed for the uses and purposes therein set forth.

C. W. Johnston. My Commission expires 1-15-29. (Seal.)

Department of the Interior, Office of the Superintendent for the Five Civilized Tribes, Muskogee, Okla.

Nov. 12, 1924.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved. See my report of even date.

C. J. Hunt, Acting Superintendent.

Department of the Interior, Office of Indian Affairs, Washington, D. C.

Nov. 19, 1924.

Respectfully submitted to the Secretary of the Interior, with recommendation that it be Approved.

E. B. Meritt, Assistant Commissioner.

Assigned 12-16-24 to I. T. I. O. by B. V. Pipkin.
Approved 1-24-25.

Department of the Interior, Washington, D. C.

Nov. 21, 1924.

Approved.

F. M. Goodwin, Assistant Secretary of the Interior.

[fol. 46] Filed in the office of the Superintendent for the Five Civilized Tribes this 28 day of July, 1924, at 8:30 o'clock A. M.

S. E. Wallen, Superintendent, by James L. Granger.

Advance Royalty Received, $6.00.

[File endorsement omitted.]

[fol. 47] In District Court of Tulsa County

No. 45612

I. T. I. O., Plaintiff,

vs.

Bd. of Equalization, Tulsa Co., Defendant

Order Overruling Motion to Dismiss and Demurrer—Nov. 26, 1929

Motion to dismiss and demurrer overruled. Appellee excepts. Judgment for appellant as per Journal Entry. Appellee excepts and gives notice in open Court of Intention to appeal to the Supreme Court of Oklahoma. 30-10-5 days for case made.

There being no further business before the Court, the Court hereby takes recess subject to call.

John Ladner, District Judge.

Attest:

Hal Turner, Court Clerk.

[fol. 48] In District Court of Tulsa County

No. 45612

In re Protest of the Indian Territory Illuminating Oil Company on Assessment of Personal Property in Tulsa County, Oklahoma, for the Year 1929

Indian Territory Illuminating Oil Company, a Corporation, Appellant,

vs.

The Board of Equalization of Tulsa County, Oklahoma, Appellee

Journal Entry of Judgment—Filed Nov. 26, 1929

The above matter comes on for trial on this the 26th day of November, 1929, in its regular order, appellant, Indian Territory Illuminating Oil Company appearing by its attorneys, Fred M. Carter and C. E. Wilhite, and the appellee, Board of Equalization of Tulsa County, Oklahoma, appearing by the County Attorney of said County, said parties waiving jury and agreeing to try said cause to the Court; thereupon appellee moves the dismissal of appellant's appeal, which said motion is overruled and [fol. 49] appellee duly allowed its exceptions, and thereupon appellee demurs to appellant's complaint which said demurrer is overruled and appellee duly allowed its exceptions, and thereupon said parties submit for the consideration of the Court their stipulation and agreed statement of facts heretofore filed herein, and the Court being advised in the premises, and after due consideration finds the issues in favor of the appellant and against the appellee.

It is therefore ordered, adjudged, and decreed that appellant's property, to wit: 4—55,000 bbl. steel storage tanks

and 51,630 bbls. of crude oil located in School District No. 22, Red Fork Township in Tulsa County, Oklahoma, be, and the same is exempt from ad valorem taxes for the year, 1929, and the taxing officials of Tulsa County are ordered and directed to strike and cancel said property from the tax rolls of said County, to all of which said appellee is duly allowed its exceptions.

And from such finding, ruling and judgment the appellee gives in open court notice of intention to appeal to the Supreme Court of the State of Oklahoma, and asks that the Court Clerk be directed to note same upon the trial docket, and it is so ordered, and the appellee praying an extension of time within which to make and serve case-made on appeal to the Supreme Court, for good cause shown, it is ordered that the appellee be granted an extension of thirty days from this date to make and serve case-[fol. 50] made on appeal, appellant to have ten days thereafter to suggest amendments, the same to be settled and signed upon five days notice in writing by either party.

By the Court:

John Ladner, District Judge.

O. K.

C. E. Wilhite, Fred M. Carter, Attorneys for Appellant, Indian Territory Illuminating Oil Co., a Corporation. Byron Kirkpatrick, County Attorney; Hugh Webster, Assistant County Attorney, Attorneys for Appellee, Board of Equalization of Tulsa County, Okla.

[File endorsement omitted.]

[fol. 51] In District Court of Tulsa County

[Title omitted]

Motion for New Trial—Filed Nov. 27, 1929.

Comes now the said appellee, Board of Equalization of Tulsa County, Oklahoma, and moves the Court to vacate and set aside the decision and judgment of the Court rendered herein on the 26th day of November, 1929, and to

grant a new trial for the following causes which affect materially the substantial rights of said appellee.

I. That the decision and judgment of the Court is not sustained by sufficient evidence.

[fol. 52] II. That the decision and judgment of the Court is contrary to law.

III. Error of the Court in holding and deciding that appellant's property is exempt from taxation.

Byron Kirkpatrick, County Attorney; Hugh Webster, Assistant County Attorney, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 53] In District Court of Tulsa County

[Title omitted]

Order Overruling Motion for New Trial—Dec. 7, 1929

Motion for new trial overruled. Appellee excepts and gives notice of intention to appeal to the Supreme Court of Oklahoma. 30-10-5 days for case made.

There being no further business before the Court, the Court hereby takes recess subject to call.

John Ladner, District Judge.

Attest:

Hal Turner, Court Clerk.

[fol. 54] In District Court of Tulsa County

[Title omitted]

Order Overruling Motion for New Trial—Filed Dec. 7, 1929

The above matter coming on for hearing on this the 7th day of December, 1929, on the motion of appellee, Board of Equalization of Tulsa County, Oklahoma, for a new trial,

the said appellee being present by the County Attorney of said County, and the said appellant appearing by its attorneys, Fred M. Carter and C. E. Wilhite, and the Court after due consideration of said motion and counsels' argument thereon, find that said motion for new trial should be overruled.

[fol. 55] It is therefore, ordered, adjudged, and decreed that said motion be, and the same is hereby overruled, to which order of the court said appellee excepts and its exception are allowed, and from such order of the Court the said appellee gives in open court, notice of intention to appeal to the Supreme Court of the State of Oklahoma, and asks that the Court Clerk be directed to note same upon the trial docket, and it is so ordered, and the said appellee praying an extension of time within which to make and serve case-made on appeal to the Supreme Court, for good cause shown it is ordered that the said appellee be granted an extension of thirty (30) days from this date to make and serve case-made on appeal, appellant to have ten (10) days thereafter to suggest amendments, the same to be settled and signed upon five (5) days' notice in writing by either party.

John Ladner, District Judge.

O. K.:

C. E. Wilhite, Attorney for Appellant. Hugh Webster, Asst. Co., Atty., Attorney for Appellee.

[File endorsement omitted.]

[fol. 56] IN DISTRICT COURT OF TULSA COUNTY

STATEMENT AS TO TRANSCRIPT

The above and foregoing sets out fully and correctly all the pleadings filed in said cause, all motions filed or made, and all rulings and orders made thereon; all exceptions taken by plaintiff and defendant to such rulings and orders; all demurrers and rulings thereon with the exceptions thereto; all evidence introduced, the objections thereto and rulings by the Court made thereon; all the exceptions taken by either party to such rulings of the Court; the judgment

of the Court, the exceptions thereto, the Motion for New Trial, the Ruling of the Court thereon and exceptions thereto; the Notice of Appeal given in open Court; and all matters and things had and done in said cause.

[fol. 57] Reporter's certificate to foregoing transcript omitted in printing.

[fol. 58] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] In District Court of Tulsa County

[Title omitted]

Certificate of Attorneys

We hereby certify that the foregoing case-made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed, all the evidence offered or introduced; all orders and rulings made by the Court, and exceptions thereto taken and allowed, and all of the record upon which the judgment in said cause was made and entered, and that the same is a full, true, correct and complete case-made.

Witness our hands on this the 17th day Dec. A. D. 1929.

Fred M. Carter, C. E. Wilhite, Attorneys for Appellant. Byron Kirkpatrick, County Atty.; Hugh Webster, Asst. Co. Atty., Attorneys for Appellee.

[fol. 60] In District Court of Tulsa County

[Title omitted]

Tender of Case-made

To the above-named appellant and to Fred M. Carter and C. E. Wilhite, its attorneys of record:

The above and foregoing case-made is hereby tendered to, and served upon you, and each of you, as a true and cor-

rect case-made in the above-styled and numbered cause, and as a true and correct statement and complete record and transcript of all pleadings, motions, testimony and evidence, orders, findings, judgments and proceedings in the above-entitled cause on this, the 13 day of December, A. D. 1929.

Byron Kirkpatrick, Co. Atty.; Hugh Webster, Asst. Co. Atty., Attorneys for Appellee.

Acknowledgment of Service

We hereby accept and acknowledge due, legal and timely service of the above and foregoing case-made upon us this the 17 day of Dec., A. D. 1929.

Fred M. Carter, C. E. Wilhite, Attorneys for Appellant.

[fol. 61] In District Court of Tulsa County

[Title omitted]

Stipulation of Attorneys as to Case-Made

We, the undersigned, Fred M. Carter and C. E. Wilhite, Attorneys of Record for the Appellant above-named; and Byron Kirkpatrick, County Attorney, and Hugh Webster, Assistant County Attorney, Attorneys of Record for the Appellee above-named, do hereby stipulate and agree that the foregoing case-made contains a full, true, complete and correct copy and transcript of all the proceedings in said cause, all the testimony and evidence introduced or offered, all the orders and rulings by the Court made, and the exceptions thereto allowed and taken by either party, and all the record upon which said judgment in said cause was made, and the same is a full, true, complete and correct case-made; and the Appellant above-named waives the right to suggest amendments to said case-made and hereby consents that the same may be settled immediately and without notice, and hereby joins in the request that the Judge of the above named Court before whom said cause was tried, settle the same and order this case-made

certified to the Clerk of the Supreme Court of the State of Oklahoma.

Witness our hands on this the 17 day of Dec., A. D. 1929.

Fred M. Carter, C. E. Wilhite, Attorneys for Appellant. Byron Kirkpatrick, County Attorney; Hugh Webster, Asst. Co. Atty., Attorneys for Appellee.

[fol. 62] In District Court of Tulsa County

[Title omitted]

Notice of Settlement of Case-made

To the above-named appellant and to C. E. Wilhite and Fred M. Carter, its attorneys of record:

You are hereby notified that on the — day of ——, A. D. 1929, at — o'clock — m., or as soon thereafter on said day as counsel can be heard, the case-made in this above-entitled cause, with any amendments theretofore suggested by you, will be presented to the Hon. John Ladner, Judge of the First Division of the above-named Court, and one of the Judges of the 21st Judicial District of the State of Oklahoma, who presided at the time of the trial of this cause in the above-named District Court, at his Chambers, in the Courthouse, Tulsa County, Oklahoma, for settlement.

Dated this — day of ——, A. D. 1929.

—— ——, Attorneys for Appellee.

Service of the above notice is hereby accepted on this the — day of ——, A. D. 1929.

—— ——, Attorneys for Appellant.

[fols. 63 & 64] In District Court of Tulsa County

[Title omitted]

Order Settling Case-made

I, the undersigned, Judge of the District Court in and for Tulsa County, Oklahoma, do hereby certify that the

foregoing was presented to me as a case-made in the above-entitled action; that at the time of the presentation of said case-made to me for settlement and signing there appeared C. E. Wilhite and Fred M. Carter, Attorneys of Record for the Appellant above-named and Byron Kirkpatrick, County Attorney, and Hugh Webster, Assistant County Attorney of Tulsa County, Oklahoma, Attorneys for the Appellee above-named; and there were no suggestions of amendments made by either of the parties to this cause, to this case-made; and I now allow, certify, settle and sign the same as a true and correct case-made and direct that it be attested and filed by the Court Clerk.

Witness my hand at Tulsa, Oklahoma, this 17 day of Dec., A. D. 1929.

John Ladner, District Judge.

Attest:

Hal Turner, Court Clerk, by Lee Evans, Deputy.
(Seal.)

[fol. 65] IN SUPREME COURT OF OKLAHOMA

21295

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, Plaintiff in Error,

vs.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, a Corporation, Defendant in Error

JUDGMENT—May 17, 1932

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed and the cause remanded.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and the cause remanded with directions to proceed consistent with the opinion filed therein.

Opinion by Andrews, J.

[fol. 66] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 21295

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, Plaintiff in Error,

vs.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, a Corporation, Defendant in Error

Syllabus

1. Since taxation is necessary to the existence and continuance of government, there are no implied exemptions from its burdens, and a relinquishment of such right by the state will not be presumed, unless a deliberate purpose to relinquish it appears.

2. Oil produced from restricted Indian land by a lessee under a departmental oil and gas mining lease during the year 1927, which is run through a pipe line to storage tanks that are seventy-five miles distant from the land from which the oil is produced and held in storage therein as the property of the lessee, the portion of the oil produced belonging to the lessor having been delivered to the Superintendent of the Five Civilized Tribes for the benefit of the lessor, is subject to ad valorem taxation by the state for the year 1929.

Error from the District Court of Tulsa County, Oklahoma

Hon. John Ladner, Judge

Reversed and remanded with Directions

W. L. Coffey, County Attorney; Hugh Webster, Ass't County Attorney, for plaintiff in error.

W. P. McGinnis, Fred M. Carter, Bartlesville; C. E. Wilhite, for defendant in error.

[fol. 67] OPINION—Filed May 17, 1932

ANDREWS, J.:

This is an appeal from a judgment of the district court of Tulsa County, holding that certain personal property belonging to the defendant in error was exempt from taxation and ordering and directing the taxing officials of Tulsa County to strike the same from the tax rolls.

The board of equalization of Tulsa County, hereinafter referred to as the plaintiff, directed the Indian Territory Illuminating Oil Company, defendant in error herein, hereinafter referred to as the defendant, to show cause why the valuation of its personal property located in Tulsa County should not be raised from $116,886.87 to $187,717.97 by including in the assessment for the year 1929 four 55,000 barrel steel storage tanks of the value of $22,000.00 and 51,630 barrels of crude oil of the value of $50,081.10. After a hearing before that board it was ordered that the property be placed upon the tax rolls for the year 1929. The defendant appealed to the district court. That court rendered a judgment in favor of the defendant in which it held that the property was exempt from taxation and in which it ordered the same to be stricken from the tax rolls. From that judgment the plaintiff appealed to this court.

It was stipulated that the steel storage tanks were owned by the defendant; that they were situated in Tulsa County; that they were not situated upon any restricted Indian land or leasehold estate; that they were not situated upon the land from which any of the oil sought to be taxed was produced; that the oil sought to be taxed was produced from land in Seminole County which was owned by restricted Indians; that the oil was produced between the dates of March 31st and June 16th, 1927; that the oil was run through a pipe line from the place of production to the storage tanks in Tulsa County, and that the oil sought to be taxed was commingled with oil from unrestricted land.

[fol. 68] It is not necessary for us to determine all of the various questions presented. We will confine our discussion to the determination of whether or not the property sought to be taxed is exempt from taxation by the state and its political subdivisions.

The defendant contends that the storage tanks are exempt from ad valorem taxation by the provisions of paragraph 5, Section 9814, C. O. S. 1921, and that the crude oil is exempt from ad valorem taxation for the reason that it was produced by the defendant as a federal governmental instrumentality from lands owned by restricted Indians.

The provisions of Section 9814, supra, relate to "machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas," and "actually used in the operation of such well." Those provisions have no application to the storage tanks sought to be taxed. Those storage tanks were situated seventy-five miles or more from the producing wells. They were not actually used in and around any well producing petroleum or other crude or mineral oil or natural gas. Going, Co. Treas., v. Shaffer, 89 Okla. 46, 213 Pac. 736. The trial court erred in holding that the storage tanks were exempt from the ad valorem taxation sought to be imposed upon them.

In Trimble et ux. v. City of Seattle, 64 Wash. 102, 116 Pac. 647, that court held:

"Since taxation is necessary to the existence and continuance of government, there are no implied exemptions from its burdens, and a relinquishment of such right by the state will not be presumed unless a deliberate purpose to relinquish it appears."

That is a correct statement of the rule applicable in Oklahoma. Before this court can hold that property is exempt from ad valorem taxation, we must find some constitutional or statutory provision exempting it from taxation. We find no provision of the Constitution or of the statutes of Oklahoma from which we can say that the property sought to be taxed is exempt from ad valorem taxation. [fol. 69] By the provisions of Section 1 of the Enabling Act, the rights of persons or property pertaining to the Indians of the Territory of Oklahoma and the Indian Territory may not be limited or impaired so long as such rights shall remain unextinguished, and the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other

rights by treaties, agreement, law or otherwise, which it would have been competent to make if the Enabling Act had never been passed, may not be limited or affected by the Constitution of Oklahoma. We must look to the Constitution and the legislative acts and treaties of the United States to determine whether or not the property is exempt from taxation by reason thereof. If it is exempt from taxation by any of those provisions, it is exempt from taxation under the laws of the State of Oklahoma. In Re Skelton Lead & Zinc Co.'s Gross Production Tax for 1919, 81 Okla. 134, 197 Pac. 495. See also In Re Protest of Bendelari, 82 Okla. 97, 198 Pac. 606.

The defendant cites many authorities to sustain its contention. All of them have been considered by this court. It is not necessary to discuss all of them herein.

The decision in Large Oil Co. v. Howard, 248 U. S. 549, 63 L. ed. 416, was based upon the decision in Choctaw, Oklahoma & Gulf R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234. The tax involved therein was a gross revenue tax.

The decision in Gillespie v. State of Oklahoma, 257 U. S. 501, 66 L. ed. 338, involved the question of the validity of a claim for state income tax.

In Jaybird Mining Co. v. Weir, Co. Treas., 271 U. S. 609, 70 L. ed. 1112, there was involved the question of whether an ad valorem tax could be levied upon lead and zinc ore extracted from restricted Indian land and stored in bins on the premises from which the ore had been extracted. This court held that the property was subject to the state ad valorem tax. Weir, Co. Treas. v. Jaybird Mining Co., [fol. 70] 104 Okla. 271, 232 Pac. 425. That judgment was reversed by the Supreme Court of the United States in the above cited case. That court held that the lessee's individual part of the ore was exempt from taxation.

If the oil sought to be taxed in this case had been stored on the premises from which it had been produced and if it had not been separated from the portion belonging to the lessor, under the rule stated in the Jaybird case, it would be exempt from ad valorem taxation. That rule is not applicable to the facts in this case which show that the portion of the oil produced, which belonged to the lessor, had been delivered to the Superintendent of the Five Civilized Tribes for the benefit of the lessor and that the lessor owned no part of the oil in storage.

In Heiner, Collector, v. Colonial Trust Co., Executor, 275 U. S. 232, 72 L. ed. 256, a Federal income tax law was involved.

In Union Pacific R. Co. v. Peniston, Co. Treas., 85 U. S. 5, 21 L. ed. 787, the Supreme Court of the United States said:

"It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operation is a direct obstruction to the exercise of Federal powers."

In Metcalf et al. v. Mitchell, 269 U. S. 514, 70 L. ed. 384, the same court held:

"Not every person who uses his property or derives a profit in his dealings with the government may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the rule that neither the Federal nor the state government can tax instrumentalities of the other.

The limitations upon the taxing power of the state or Federal government, so far as it affects the other, cannot be so varied or extended as seriously to impair the taxing power of the government imposing the tax, or the appropriate functions of the government affected by it."

[fol. 71] Our attention has been called to no provision of the Constitution, statutes, or Indian treaties of the United States, or no decision of any court from which we can conclude that the property herein sought to be taxed is exempt from taxation. We know of none.

The trial court erred in holding that the property herein sought to be taxed was not subject to ad valorem taxation. The judgment of that court is reversed and the cause is

remanded to it with directions to render judgment in accordance herewith.

Riley, Hefner, Cullison, Swindall, McNeill, and Kornegay, JJ., concur. Lester, C. J., and Clark, V. C. J., absent.

[fol. 72] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed May 28, 1932

Comes now the Indian Territory Illuminating Oil Company, Defendant in Error in the above case and respectfully represents to the court that on the 17th day of May, 1932, a decree and judgment was entered by this court in this cause wherein and whereby it was adjudged and decreed that 51,630 barrels of crude oil produced by Defendant in Error as lessee under a departmental oil and gas lease duly approved by the Secretary of the Interior from lands located in Seminole County, Oklahoma and owned by Indians who are members of the Seminole Tribe and wards of the Government whose restrictions against alienation of said land have never been removed and of the value of $50,081.10 was subject to ad valorem taxation in Tulsa County, Oklahoma for the tax year beginning July 1, 1929, at the mill rate levy of said county, township and district for said year; which said oil after being produced from the restricted lands aforesaid was as produced transported by pipeline to certain storage tanks of Defendant in Error in Tulsa County, Oklahoma and there held in storage pending sale and at the time said oil was adjudged and decreed subject to said tax the same had never been sold or converted into any other form of property.

That said decision overlooked a question decisive of the case and duly submitted by Counsel in this, to-wit: The case of Dolese Brothers Company against Board of County Commissioners of Comanche County, 151 Okla. 110, 2 Pac. (2) 955, which said case held and decided and it was so decreed that Section 9966 C. O. S. 1921, repealed and super-

seded Sections 9675, 9684 and 9685 C. O. S. 1921, in all respects in which the said Sections of the Statute are in conflict with Section 9966; that appeal of this cause from the County Board of Equalization to the District Court of Tulsa County was not taken and perfected in the manner required and provided by Section 9966, but was taken and filed under and in accordance with the provisions of Sections 9675, 9684 and 9685; that the question of the jurisdiction of the District Court of Tulsa County to entertain said appeal and determine the cause on its merits was raised and presented in the District Court of Tulsa County by motion to dismiss for want of jurisdiction of the appeal, which motion was by the District Court overruled; that the same question was preserved in this court and briefed and presented; that in such situation this Honorable Court is without jurisdiction to hear and determine this case on its merits until this court shall have first heard and determined the jurisdictional question, that is that the District Court [fol. 73] of Tulsa County did properly take and retain jurisdiction of said appeal from the Board of Equalization of said County under the record in this case; for the reason that if the District Court did not have such jurisdiction of the case as to permit and allow it to hear and determine the case on the merits then there is no case before this court on the merits of the issues involved.

Wherefore Defendant in Error prays that a rehearing of said cause may be granted by this Honorable Court.

W. P. McGinnis, Fred M. Carter, C. E. Wilhite,
Attorneys for Defendant in Error.

[fols. 74 & 75] In Supreme Court of Oklahoma

[Title omitted]

Order Denying Rehearing—June 7, 1932

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby denied.

[fol. 76] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 77] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Sept. 14, 1932

Comes now the Indian Territory Illuminating Oil Company, the appellant in the above entitled cause, and states that the points upon which it intends to rely in this Court in this case are as follows:

Point 1. That the Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Tulsa County, Oklahoma, and in holding and deciding that the said District Court of Tulsa County, Oklahoma, erred in holding that the property sought to be taxed in this cause was not subject to ad valorem taxation for the year 1929 by the State of Oklahoma or any political subdivision thereof.

Point 2. That the Supreme Court of the State of Oklahoma erred in refusing to affirm the judgment of the District Court of Tulsa County, Oklahoma.

[fol. 78] Point 3. That the Supreme Court of the State of Oklahoma erred in holding, deciding and determining that Section 9574 and succeeding sections of Chapter 84 Compiled Oklahoma Statutes 1921, particularly Sections 9814, 9627 and 9614, which provide for the assessment, levy and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma during any given tax year are valid when applied to crude petroleum produced from the allotment of a restricted Seminole Indian in Seminole County, Oklahoma, by a lessee under a lease executed by such restricted allottee and duly approved by the Secretary of the Interior, and while the oil so produced is still owned and held in storage in its original state and not disposed of by said lessee and in rendering a decision in favor of the validity of said Statutes when applied to and constructed to cover the property sought to be taxed in this cause, and in not holding under the facts in this cause that said Statutes as so applied are repugnant to the Constitution, Treaties and Laws of the United States.

Point 4. The Supreme Court of the State of Oklahoma erred in holding, deciding, and determining that the acts of the County Assessor, the County Treasurer and the Board of Equalization of Tulsa County, Oklahoma, and the authority exercised by them and each of them under and the authority conferred and vested in them by the said Statutes of the State of Oklahoma mentioned specifically in assignment number 3 herein and above set forth, and other statutes of the State of Oklahoma authorizing the assessment of an ad valorem tax on the property involved in this cause for the period in question are valid, and in rendering a decision in favor of their validity and in not holding said Statutes and the authority so exercised by the officials aforesaid under said Statutes repugnant to the Constitution, Treaties and Laws of the United States.

[fol. 79] Point 5. That the Supreme Court of the State of Oklahoma erred in sustaining the above mentioned Statutes of the State of Oklahoma, authorizing the assessment, levy and collection of ad valorem tax on the crude oil involved in this case, said crude oil being held in storage, unsold and in its original state throughout and during the entire tax period in question by the petitioner herein, and said crude oil having been by the petitioner produced solely under an oil and gas lease upon restricted Seminole lands under the control of Congress and the Secretary of the Interior.

Point 6. That the Supreme Court of the State of Oklahoma erred in its decision denying that the said crude oil produced by the petitioner is and was exempt from ad valorem taxation as claimed by the petitioner under the Constitution, Treaties and Laws of the United States.

And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

Title of Paper	Record Page
Citation and Service	1
Petition for Appeal to the Supreme Court of the United States	3
Assignment of Errors	9
Order Allowing Appeal	11

Title of Paper	Record Page
Bond, Showing Approval	13
Stipulation as to Contents of Transcript of Record	15
Petition in Error	16
Case-Made	18
Journal Entry of Judgment of Supreme Court of Oklahoma	65
[fol. 80] Opinion of Supreme Court of Oklahoma	66
Petition for Rehearing	72
Order Denying Petition for Rehearing	74
Clerk's Certificate	76

John H. Miley, Counsel for Appellant.

Service of the above and foregoing Statement of Points To Be Relied Upon and Designation of the Parts of The Record to be Printed, and receipt of a copy thereof, is acknowledged this 7th day of September, 1932.

W. L. Coffey, County Attorney; Hugh Webster, Asst. County Atty., Attorneys of Record for Board of Equalization of Tulsa County, Oklahoma, Appellee.

[fol. 81] [File endorsement omitted.]

Endorsed on cover: File No. 37,053. Oklahoma Supreme Court. Term No. 356. Indian Territory Illuminating Oil Company, Appellant, vs. Board of Equalization of Tulsa County, Oklahoma. Filed September 8, 1932. File No. 37,053.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 12, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U.S.
FILED
OCT 7 1932
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

NO. 356

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
a Corporation,
Appellant,

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY,
OKLAHOMA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION ON APPEAL

JOHN H. MILEY,
Counsel for Appellant.

Utterback Typesetting Co., Oklahoma City

NO. 356

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
a Corporation,
Appellant,

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY,
OKLAHOMA,
Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL

May It Please the Court:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

STATUTORY PROVISIONS BELIEVED TO SUSTAIN THE JURISDICTION

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. at L. 936, 937 (United States Code, Title 28, Section 344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "Sec. 237 (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the

validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, C. 14, Sec. 1, 45 Stat. 54, entitled "An Act in Reference to Writs of Error," provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of April 26, 1928, C. 440, 45 Stat. 466, amending the Act of January 31, 1928, C. 14, Sec. 2, 45 Stat. 54, provides:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to courts, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

DATE OF JUDGMENT AND DATE OF APPLICATION FOR APPEAL

The judgment sought to be reviewed was entered on the 17th day of May, 1932 (R. 65, 66).*

The application for appeal was presented on the 12th day of August, 1932 (R. 12).

C.

NATURE OF CASE AND RULING BELOW

The question involved in this case is whether 51,630 barrels of crude oil of the value of $51,081.00, located in certain tanks in Tulsa County, State of Oklahoma, on January 1, 1929, were subject to assessment for ad valorem taxation by the taxing agencies of the State of Oklahoma and the municipalities thereof, for the year 1929 (R. 31).

The oil in question was produced by the appellant, prior to January 1, 1929, from lands located in Seminole County, Oklahoma, owned by Seminole allottees, members of the Seminole tribe of Indians, as their individual allotments, from which restrictions against alienation imposed by Acts of Congress had not been removed (R. 32-44). The oil was produced by appellant under and pursuant to leases executed by the several allottees and approved by the Secretary

*All references to the record are to pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Oklahoma and on file with the Clerk of this Court. The record has not yet been printed.

of the Interior pursuant to the authority of the Act of Congress approved May 27, 1928 (35 Stat. L. 312), (R. 34 to 46). The said oil so produced, together with other oil, was immediately after production piped into the storage tanks where it has since remained in its original state. The said oil so produced by the appellant had not been disposed of by it from the time of the production thereof until and throughout the entire tax period in question (R. 33).

The assessing officers of the State of Oklahoma claim that such oil is subject to assessment for ad valorem taxation for the support of state government and the several political subdivisions thereof for the year 1929, by virtue of certain statutes of the State of Oklahoma, particularly, to-wit: Sec. 9814, Compiled Oklahoma Statutes, 1921, which imposes a gross production tax upon crude oil at the time of production, in lieu of any other tax thereon for the year in which it is produced, but which provides that:

> "* * * oil in storage * * * produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

Sec. 9627, C. O. S., 1921, provides that:

> "It shall be the duty of the * * * assessor * * * in which tanks * * * for storage of crude petroleum are located to assess as other property is assessed to the proper owners at the fair cash value, as hereinbefore defined, any and all such tanks and contents thereof."

And Sec. 9666, C. O. S., 1921, as amended by Ch. 209, Session Laws, Oklahoma, 1927, p. 258, provides:

> "The County Assessor shall on the 15th day of January of each year, proceed to take a list of all taxable property in the county and assess the value thereof as of January first * * *."

It is the contention of the appellant that such statutes of the State of Oklahoma and other provisions of Ch. 84, C. O. S., 1921, relating to Revenue and Taxation, providing for the assessment, levy, and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma are invalid when applied to the crude oil in question, because repugnant to the Constitution, treaties, and laws of the United States, in that the appellant is an agency or instrumentality employed by the Government of the United States for the development and use of the restricted land of its Indian wards for their benefit. (*Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Large Oil Co.* v. *Howard,* 248 U. S. 549; *Howard* v. *Oil Companies,* 247 U. S. 503; *Choctaw O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *McCullouch* v. *Maryland,* 4 Wheat 316).

The validity of the statutes of the State, as applied to the oil in question on the ground aforesaid, was drawn in question at the inception of the proceeding and maintained

throughout, and the final decision of the Supreme Court of the State of Oklahoma, from which decision this appeal was taken, was in favor of the validity of the Statute as so applied.

The appellant, in listing its taxable property with the County Assessor, claimed that notwithstanding said State statutes, the said oil was not subject to taxation under the Constitution, laws and treaties of the United States (30 Stat. L. 567; 34 Stat. L. 137; 35 Stat. L. 312; 45 Stat. L. 495 and 34 Stat. L. 267), which claim was denied and the said property ordered listed for assessment for ad valorem taxation for said year (R. 31).

Thereupon the appellant, as provided by the laws of the State of Oklahoma, appeared before the Board of Equalization of Tulsa County, Oklahoma, to show cause why the said oil should not be so assessed, which board overruled the claim and protest, and directed that said oil be added to the assessment roll for said year as assessable and taxable property of appellant (R. 22, 27, 32).

Thereupon, as provided by the laws of the State, the appellant appealed to the District Court of Tulsa County, Oklahoma (R. 24).

The said District Court, upon regular hearing, rendered judgment in favor of appellant (R. 48-50), sustaining its claim aforesaid, and directed that the assessment be

canceled and the said property stricken from the tax rolls for said year (R. 49).

From said judgment the appellee herein, as provided by the laws of the State, appealed to the Supreme Court of the State of Oklahoma.

The Supreme Court of the State of Oklahoma, upon hearing, rendered its final decision May 17, 1932 (R. 65), denying the contention of appellant, and rendered judgment that said property be restored to the tax rolls and assessed for ad valorem taxation for said year. In the concluding paragraph of the opinion of the Supreme Court (R. 66-71) it was stated:

> "The trial court erred in holding that the property herein sought to be taxed was not subject to ad valorem taxation. The judgment of that court is reversed and the cause is remanded to it with directions to render judgment in accordance herewith."

As allowed by the rules of said Supreme Court, the appellant filed a petition for re-hearing therein on May 28, 1932 (R. 72), which was denied by order entered on June 7, 1932 (R. 74).

The Supreme Court is the highest Court of the State of Oklahoma in which a decision of the suit can be had, and its decision and judgment aforesaid is final.

D.

CASES BELIEVED TO SUSTAIN JURISDICTION

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Jaybird Mining Company v. *Weir*, 271 U. S. 609.

Gillespie v. *State of Oklahoma*, 257 U. S. 501.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282.

We respectfully submit that this Court has jurisdiction of this appeal.

Respectfully submitted.

JOHN H. MILEY,
Counsel for Appellant.

FILE COPY

Office Supreme Court, U.S.
FILED
NOV 22 1932
CHARLES ELMORE CROPLEY
CLERK

NO. 356

In the Supreme Court of the United States

OCTOBER TERM, 1932.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, a Corporation,
Appellant,

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT OF PAPERS WHEREON APPEAL WAS ALLOWED AS PETITION FOR WRIT OF CERTIORARI

JOHN H. MILEY,
Counsel for Petitioner.

Utterback Typesetting Co., Oklahoma City

SUBJECT INDEX

		Page
I.	The Opinions of the Courts Below	1
II.	Jurisdiction	2
III.	Statement of the Case	10
IV.	Specification of Errors	13
V.	Argument	17
	Summary of Argument	16
	Point A. The State Supreme Court has decided a Federal question of substance in a way not in accord with the applicable decisions of this Court	16
	Point B. The lessee of restricted Seminole land for oil and gas mining purposes, under a lease executed pursuant to Sec. 2 of the Act of May 27, 1908 (Ch. 199, 35 Stat. L. 312), with the approval of the Secretary of the Interior, is an agency or instrumentality of the Government of the United States. The lessee's share of the product as specified in the lease, as well as that of the Indian ward, produced from such land by virtue of the lease and under the supervision of the Secretary of the Interior is not subject to taxation by the state while held in storage in its original form prior to sale thereof by the lessee	16

TABLE OF CASES CITED

Apponoose County v. Henke, 207 Iowa 835 34
Board of County Commissioners of Payne County v. Indian Territory Illuminating Oil Co., 14 Pac. (2d) 929 23
Board of Equalization of Tulsa County v. Indian Territory Illuminating Oil Co., 13 Pac. (2d) 585 1
Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292 ..... 6, 16, 18, 23
Citizens Nat. Bank of Cincinnati v. Durr, 257 U. S. 99 10
Colley v. H. L. Edwards Co., 258 S. W. 191 34
Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282 9
Dana v. Dana, 250 U. S. 220 10
Edgewood Distilling Co. v. Rosser's Admr., 116 Va. 624 34
First National Bank of Cushing v. Funnell, 144 Okla. 188 34
Gillespie v. Oklahoma, 257 U. S. 501 ..... 5, 9, 16, 25
Harrington v. United States, 11 Wall. 356 34
Holmes v. Marshall, 145 Ca. 777 34
Howard v. Oil Companies, 247 U. S. 503 ..... 5, 16, 22

Page

Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522...5, 16, 18, 23
In re Skelton Lead & Zinc Co's Gross Production Tax, 81 Okla. 134..... 24
Jaybird Mining Co. v. Weir, 271 U. S. 609.....5, 8, 16, 31
Large Oil Co. v. Howard, 248 U. S. 549.....5, 16, 22, 23
McAlester-Edwards Coal Co. v. Trapp, 43 Okla. 510..... 18
McCulloch v. Maryland, 4 Wheat 316.....6, 16
Shaffer v. Carter, 252 U. S. 37..... 24
State v. Northwestern Elevator Co., 101 Minn. 192..... 34
United Express Co. v. Minnesota, 233 U. S. 335..... 20

Table of Statutes Cited

Act of April 26, 1906, Chap. 1876 (34 Stat. 137)..... 6
Act of June 16, 1906, Chap. 3335 (34 Stat. 267)..... 6
Act of June 28, 1898, Chap. 517 (30 Stat. 567)..... 6
Act of May 27, 1908, Chap. 199 (35 Stat. 312).....4, 6, 16
Act of May 10, 1928, Chap. 517 (45 Stat. 495)..... 6
Compiled Oklahoma Statutes 1921, Chap. 84.....6, 14
Section 9627 .....5, 14
Section 9666, as amended by Ch. 209, Session Laws of Oklahoma, 1927, p. 258.....5, 14
Section 9814 .....5, 14, 20
Sec. 237 (b) (c) of the Judicial Code, as amended by the Act of February 14, 1925, 43 Stat. 937.....2, 9
Session Laws Oklahoma, 1916, Chap. 39, p. 102..... 20

NO. 356

In the Supreme Court of the United States

OCTOBER TERM, 1932.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, a Corporation,
Appellant,

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT OF PAPERS WHEREON APPEAL WAS ALLOWED AS PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below

The opinions of the courts below have not yet been officially reported. The opinion in the Supreme Court (the highest court of the state) is unofficially reported in *Board of Equalization of Tulsa County* v. *Indian Territory Illuminating Oil Co.*, 13 Pac. Rep. (2nd Series) 585. The opinion is dated May 17, 1932, and appears in the record (R. 66)*.

*All references to the record are to pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Oklahoma and on file in this Court. The record had not been printed at the time this brief was prepared.

II.

Jurisdiction

1. The statutory provisions believed to sustain the jurisdiction are Sec. 237 (b) (c) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. L. 937 (Sec. 344 U. S. C. A.), which read in part as follows (italics supplied to indicate provisions particularly applicable):

> "Sec. 237 (b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error (now appeal, Act of Jan. 31, 1928, C. 14, Sec. 1, 45 Stat. 54) any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; *or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States;* and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to review on a writ of error (now appeal) in a case where such a right is conferred by the preceding paragraph; *nor shall the fact that a review on a writ of error* (now appeal) *might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.*

"(c) If a writ of error (now appeal) be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error (now appeal) was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error (now appeal) was allowed* * *."

2. The date of the judgment and decree to be reviewed is May 17, 1932 (R. 65), pursuant to the opinion of the court filed the same day (R. 66). Petition for rehearing was duly filed (R. 72) and denied June 7, 1932 (R. 74). The petition for appeal to this Court (R. 2) accompanied by assignment of errors and prayer for reversal (R. 7) was presented to the Chief Justice of the Supreme Court of Oklahoma on the 12th day of August, 1932, and appeal was allowed by him on that date (R. 12). Appeal bond was presented and approved on August 12, 1932 (R. 14). Citation was issued on the 12th day of August, 1932, and service acknowledged August 16, 1932 (R. 1). The transcript of the record of the Supreme Court, including all the appeal papers, was lodged in the office of the clerk of this Court on September 8, 1932.

3. The nature of the case and ruling below are as follows:

The question involved in this case is whether 51,630 barrels of crude oil of the value of $50,081.10, located in certain tanks in Tulsa County, State of Oklahoma, on Jan-

uary 1, 1929, were subject to assessment for ad valorem taxation by the taxing agencies of the State of Oklahoma and the municipalities thereof, for the year 1929 (R. 31).

The oil in question was produced by the petitioner (appellant), prior to January 1, 1929, from lands located in Seminole County, Oklahoma, owned by Seminole allottees, members of the Seminole tribe of Indians, as their individual allotments, from which restrictions against alienation imposed by Acts of Congress had not been removed (R. 32-44). The oil was produced by petitioner (appellant) under and pursuant to leases executed by the several allottees and approved by the Secretary of the Interior pursuant to the authority of the Act of Congress approved May 27, 1928 (35 Stat. L. 312), (R. 34 to 46), which provided for a division of the oil produced, of 12½ per cent to the Indian ward and the remainder to the lessee. The said oil so produced, together with other oil, was immediately after production piped into the storage tanks where it has since remained in its original state. The said oil so produced by the petitioner (appellant) had not been disposed of by it from the time of the production thereof until and throughout the entire tax period in question (R. 33).

The assessing officers of the State of Oklahoma claim that such oil is subject to assessment for ad valorem taxation for the support of state government and the several political subdivisions thereof for the year 1929, by virtue of certain statutes of the State of Oklahoma, particularly,

to-wit: Sec. 9814, Compiled Oklahoma Statutes 1921, which imposes a gross production tax upon crude oil at the time of production, in lieu of any other tax thereon for the year in which it is produced, but which further provides that:

> "* * * oil in storage * * * produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

Sec. 9627, C. O. S. 1921, provides that:

> "It shall be the duty of the * * * assessor * * * in which tanks * * * for storage of crude petroleum are located to assess as other property is assessed to the proper owners at the fair cash value, as hereinbefore defined, any and all such tanks and contents thereof."

And Sec. 9666, C. O. S. 1921, as amended by Ch. 209, Session Laws, Oklahoma 1927, p. 258, provides:

> "The County Assessor shall on the 15th of January of each year, proceed to take a list of all taxable property in the county and assess the value thereof as of January first * * *."

It is the contention of petitioner (appellant) that it is an agency or instrumentality employed by the Government of the United States for the development and use of the restricted land of its Indian wards for their benefit (*Jaybird Mining Co.* v. *Weir*, 271 U. S. 609; *Gillespie* v. *Oklahoma*, 257 U. S. 501; *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522; *Large Oil Co.* v. *Howard*, 248 U. S. 549; *Howard* v. *Oil Companies*, 247 U. S. 503; *Choctaw O.*

& G. R. Co. v. *Harrison,* 235 U. S. 292; *McCulloch* v. *Maryland,* 4 Wheat 316), and it is immune from taxation on such oil so produced and held in storage in its original state; and that such statutes of the State of Oklahoma and other provisions of Ch. 84, C. O. S. 1921, relating to revenue and taxation, providing for the assessment, levy, and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma are invalid when applied to the crude oil in question, because repugnant to the Constitution, treaties, and laws of the United States.

The immunity from taxation and the validity of the statutes of the State, as applied to the oil in question on the ground aforesaid, was drawn in question at the inception of the proceeding and maintained throughout, and the final decision of the Supreme Court of the State of Oklahoma, which is here sought to be reviewed, was against such immunity from taxation and in favor of the validity of the statutes as so applied.

The petitioner (appellant), in listing its taxable property with the county assessor, claimed that notwithstanding said State statutes, the said oil was not subject to taxation under the Constitution, laws and treaties of the United States (30 Stat. L. 567; 34 Stat. L. 137; 35 Stat. L. 312; 45 Stat. L. 495 and 34 Stat. L. 267), which claim was denied and the said property ordered listed for assessment for ad valorem taxation for said year (R. 31).

Thereupon the petitioner (appellant), as provided by the laws of the State of Oklahoma, appeared before the Board of Equalization of Tulsa County, Oklahoma, to show cause why the said oil should not be so assessed, which board overruled the claim and protest and directed that said oil be added to the assessment roll for said year as assessible and taxable property of appellant (R. 22, 27, 32).

Thereupon, as provided by the laws of the State, the appellant appealed to the District Court of Tulsa County, Oklahoma (R. 24).

The said district court, upon regular hearing, rendered judgment in favor of petitioner (appellant) (R. 48-50), sustaining its claim aforesaid, and directed that the assessment be canceled and the said property stricken from the tax rolls for said year (R. 49).

From said judgment the respondent (appellee) herein, as provided by the laws of the State, appealed to the Supreme Court of the State of Oklahoma.

The Supreme Court of the State of Oklahoma, upon hearing, rendered its final decision May 17, 1932 (R. 65), denying the contention of appellant, and rendered judgment that said property be restored to the tax rolls and assessed for ad valorem taxation for said year. In the concluding paragraph of the opinion of the Supreme Court (R. 66-71) it was stated:

"The trial court erred in holding that the property herein sought to be taxed was not subject to ad valorem taxation. The judgment of that court is reversed and the cause is remanded to it with directions to render judgment in accordance herewith."

The Supreme Court is the highest court of the State of Oklahoma in which a decision of the suit can be had, and its decision and judgment aforesaid is final.

4. Counsel for petitioner was of the opinion that the question of the proper mode to invoke the jurisdiction to secure a review of the case had been definitely settled and was ruled by *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, which involved the validity of an ad valorem tax assessed by the officials of the State under the same State statutes here involved, upon the product of the restricted land of an Indian pursuant to a lease executed by the Indian with the approval of the Secretary of the Interior. In that case this Court said in concluding the opinion:

"In this case the lease was made to secure the development of the lands and obtain for the benefit of the restricted Indian owners a percentage of the gross proceeds of the ores to be mined. The ad valorem tax here in controversy was assessed on the ores in mass at the mine before sale, and that was an attempt to tax an agency of the Federal Government within the principle of the cases cited.

"From abundance of caution the company presented a petition for a writ of certiorari; *but, as a writ of error lies* (now appeal) the petition will be denied. *Gillespie* v. *Oklahoma, supra,* 506 (66 L. ed. 341, 42 Sup. Ct. Rep. 171)."

The *Gillespie Case*, 257 U. S. 506, cited in the foregoing, involved the validity of a state tax upon the net income derived by a lessee of restricted Indian lands obtained from his share of the sale of oil and gas under such leases. The Supreme Court of the State had sustained the validity of the tax, and in reversing the decision on the ground that such income of an instrumentality of the United States was not subject to the tax, this Court concluded its opinion as follows:

> "*As a writ of error* (now appeal) *lies in this case*, the petition for certiorari that was presented for greater caution will be denied. *Dahnke-Walker Mill Co.* v. *Bondurant*, December 12, 1921" (257 U. S. 282.)

In *Dahnke-Walker Mill Co.* v. *Bondurant*, 257 U. S. 282, this Court considered the question at length, and held that a case was rightfully brought to this Court by writ of error (now appeal) where the state court applied and enforced to appellant's disadvantage a state statute (otherwise valid) which the appellant seasonably insisted as so applied and enforced was repugnant to the Constitution.

Since it now appears from the memorandum entered November 7, 1932, dismissing the appeal herein, that counsel has misinterpreted these decisions, it is respectfully submitted that although the validity of the state statutes under which the tax was imposed and sustained was not drawn in question, in their entirety, the jurisdiction to review by certiorari is conferred by that portion of Sec. 237 (b) as follows:

"• • • or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States."

In the following cases involving claims of immunity from state taxation on Federal grounds, it was held that review might be had by certiorari:

Citizens Nat. Bank of Cincinnati v. *Durr,* 257 U. S. 99.

Dana v. *Dana,* 250 U. S. 220.

III.

Statement of the Case

This case in the court below involved the claim of the petitioner (appellant) that certain of its property sought to be assessed by the tax officials of the State of Oklahoma was exempt from assessment for ad valorem taxation for the year 1929, viz: (a) four 53,000 bbl steel tanks of the value of $22,000, and (b) 51,630 bbls of crude oil of the value of $50,081.10.

The claim of exemption with respect to the four steel tanks was based upon the construction of certain statutes of the State. The decision of the Supreme Court of the State of Oklahoma that such tanks were not so exempt is of course final and is not subject to review by this Court since no Federal question is involved. In fact it was conceded in the Supreme Court that under an earlier decision

which had been overlooked and was not called to the attention of the district court, that court erred in holding that the four tanks were not subject to taxation.

The claim of exemption with reference to the 51,630 barrels of crude oil does involve a Federal question, and it is in respect to that portion of the decision affecting this property that a review by this Court is sought.

The proceedings and claims with respect to the 51,630 barrels of crude oil were as follows:

The petitioner did not include this oil in its return to the county assessor of Tulsa County, of property in that county subject to assessment for the year 1929.

The County Board of Equalization served notice on the petitioner to show cause before it on June 5, 1929, why said property should not be listed and assessed.

The petitioner appeared and protested and objected to such listing and assessment, saying:

> "That the item of 51,630 barrels of crude oil in storage, of 38.2 gravity, produced from lands owned by restricted Indians, of the assessed value of $50,081.10, is not subject to ad valorem taxation in said county, for the reasons:
>
> "(a) That Indian Territory Illuminating Oil Company, in the producing of said oil, was operating as a governmental instrumentality, and under the Acts of Congress and the decisions of the United States Supreme Court, said product so produced, is not taxable by the State of Oklahoma, or any of its political or municipal subdivisions.

"(b) That said oil constitutes, as to Indian Territory Illuminating Oil Company, income derived from a restricted source, and as such income, under the Acts of Congress and the decisions of the United States Supreme Court, such property is not taxable by the State of Oklahoma, or any of its political or municipal subdivisions" (R. 25-26).

The protest and objection was overruled, and the board ordered that the 51,630 barrels of crude oil be listed as property subject to ad valorem taxation, and that it be assessed at the valuation of $50,081.10 (R. 22-23-24).

The petitioner then appealed to the District Court of Tulsa County, Oklahoma (R. 24-27).

At the trial in that court the facts were stipulated by the parties (R. 30-46).

The facts so stipulated are briefly summarized in the opinion of the State Supreme Court as follows:

"It was stipulated that the steel storage tanks were owned by the defendant; that they were situated in Tulsa County; that they were not situated upon any restricted Indian land or leasehold estate; that they were not situated upon the land from which any of the oil sought to be taxed was produced; that the oil sought to be taxed was produced from lands in Seminole County, which was owned by restricted Indians; that the oil was produced between the dates of March 31 and June 16, 1927; that the oil was run through a pipe line from the place of production to the storage tanks in Tulsa County, and that the oil sought to be taxed was commingled with oil from unrestricted land" (R. 67).

A copy of one of the leases on the restricted Indian

lands, approved by the Secretary of the Interior, from which the 51,630 barrels of oil in question was produced, is shown in the record (R. 34-46). The leases are in substantially the same form involved in the previous decisions of this Court hereafter referred to.

The state district court rendered its judgment sustaining the claim aforesaid, that the 11,630 barrels was exempt from ad valorem taxation, and ordered the same stricken from the tax rolls (R. 48-50).

The Board of Equalization of Tulsa County appealed from that judgment to the Supreme Court of the State (R. 49, 55).

The Supreme Court of the State denied the claim of exemption aforesaid, held the oil in question subject to taxation, and reversed the judgment of the district court, and directed that judgment be rendered in accordance with its views (R. 71, 65).

IV.

Specification of Errors

1. The Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Tulsa County, Oklahoma, and in holding and deciding that the said District Court of Tulsa County, Oklahoma, erred in holding that the property sought to be taxed in this cause was not subject to ad valorem taxation for the year 1929,

by the State of Oklahoma, or any political subdivision thereof.

2. The Supreme Court of the State of Oklahoma erred in refusing to affirm the judgment of the District Court of Tulsa County, Oklahoma.

3. The Supreme Court of the State of Oklahoma erred in holding, deciding and determining that Section 9574, and succeeding sections of Chapter 84, Compiled Oklahoma Statutes 1921, particularly Sections 9814, 9627 and 9614, which provide for the assessment, levy and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma during any given tax year are valid when applied to crude petroleum produced from the allotment of a restricted Seminole Indian in Seminole County, Oklahoma, by a lessee under a lease executed by such restricted allottee and duly approved by the Secretary of the Interior, and while the oil so produced is still owned and held in storage in its original state and not disposed of by said lessee and in rendering a decision in favor of the validity of said statutes when applied to and construed to cover the property sought to be taxed in this cause, and in not holding under the facts in this cause that said statutes as so applied are repugnant to the Constitution, treaties and laws of the United States.

4. The Supreme Court of the State of Oklahoma erred in holding, deciding and determining that the acts of the

county assessor, the county treasurer and the Board of Equalization of Tulsa County, Oklahoma, and the authority exercised by them and each of them under and by the authority conferred and vested in them by the said statutes of the State of Oklahoma mentioned specifically in assignment number three herein and above set forth, and other statutes of the State of Oklahoma authorizing the assessment of an ad valorem tax on the property involved in this cause for the period in question are valid, and in rendering a decision in favor of their validity and in not holding said statutes and the authority so exercised by the officials aforesaid under said statutes repugnant to the Constitution, treaties and laws of the United States.

5. The Supreme Court of the State of Oklahoma erred in sustaining the above mentioned statutes of the State of Oklahoma, authorizing the assessment, levy and collection of ad valorem tax on the crude oil involved in this case, said crude oil being held in storage, unsold and in its original state throughout and during the entire tax period in question by the petitioner herein, and said crude oil having been by the petitioner produced solely under an oil and gas lease upon restricted Seminole lands under the control of Congress and the Secretary of the Interior.

6. The Supreme Court of the State of Oklahoma erred in its decision denying that the said crude oil produced by the petitioner is and was exempt from ad valorem taxation

as claimed by the petitioner under the Constitution, treaties and laws of the United States.

V.

Summary of the Argument

Point A: The State Supreme Court has decided a Federal question of substance in a way not in accord with applicable decisions of this Court, which decisions are as follows:

Jaybird Mining Co. v. *Weir*, 271 U. S. 609.

Gillespie v. *Oklahoma*, 257 U. S. 501.

Indian Territory Illuminating Oil Co. v. *Oklahoma*, 240 U. S. 522.

Large Oil Co. v. *Howard*, 248 U. S. 549.

Howard v. *Oil Companies*, 247 U. S. 503.

Choctaw O. & G. R. Co. v. *Harrison*, 235 U. S. 292.

McCulloch v. *Maryland*, 4 Wheat 316.

Point B: The lessee of restricted Seminole Indian land for oil and gas mining purposes, under a lease executed pursuant to Sec. 2 of the Act of May 27, 1908 (Ch. 199, 35 Stat. L. 312), with the approval of the Secretary of the Interior, is an agency or instrumentality of the Government of the United States. The lessee's share of the product as specified in the lease, as well as that of the Indian ward, produced from such land by virtue of the lease and under the supervision of the Secretary of the Interior is not sub-

ject to taxation by the state while held in storage in its original form, prior to sale thereof by the lessee.

ARGUMENT

The immunity from taxation claimed by petitioner on the oil in question appears to be well established by the series of decisions of this Court culminating in the Gillespie case. The application of the principles decided in that case to the property involved in the Jaybird Mining Co. case (ores mined by lessee from land of a restricted Indian under lease approved by the Secretary of the Interior) resulted in the conclusion by this Court that the same was not subject to ad valorem taxation by the state. The application to the crude oil here involved must undoubtedly result in a like conclusion.

A brief review of this series of decisions should be sufficient to demonstrate the correctness of the propositions stated in the summary.

The first of the decisions in the order of rendition is *Choctaw O. & G. R. Co.* v. *Harrison,* 235 U. S. 292. In that case there was involved the validity of a statute of the State of Oklahoma imposing a tax as applied to the appellant. The statute, approved May 27, 1908, as amended by the Act of March 27, 1909, levied a tax of ½ of 1 per centum on the gross receipts derived from coal mined and produced in the state. The act expressly provided that the tax "*shall be in*

addition to the taxes levied and collected upon an ad valorem basis upon such mining * * * property, and the appurtenances thereto belonging."

The appellant was the lessee of certain unallotted lands of the Choctaw and Chickasaw Indians for coal mining purposes, the leases having been executed by trustees pursuant to an Act of Congress. The appellant claimed that with respect to the coal mined from such lands, that it was a Federal instrumentality acting under congressional authority, and as such not liable to the tax on coal so mined. The State Supreme Court had previously, in *McAlester-Edwards Coal Co.* v. *Trapp,* 43 Okla. 510, construed the tax as one upon property (the coal after production) and not upon the privilege of mining, and hence not an unlawful burden on a federal agency or instrumentality. This Court nevertheless sustained the claim of the lessee mining company. In the opinion it was said:

> "From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. Such an agency cannot be subjected to an occupation or privilege tax by a state. *McCullock* v. *Maryland,* 4 Wheat. 316, 425, 4 L. ed. 579, 606; *Farmers & M. Sav. Bank* v. *Minnesota,* 232 U. S. 516, 58 L. ed. 706, 34 Sup. Ct. Rep. 354."

The next case to come before this Court was *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522,

which was before this Court on writ of error to the Supreme Court of Oklahoma to review its judgment. 43 Okla. 307. The State Court had denied the claim of the appellant that as an agency or instrumentality of the Federal Government as sub-lessee under a lease of lands of the Osage Tribe of Indians for oil and gas mining purposes, granted by authority of an Act of Congress, the value of such sub-leases could not be included in determining the value of its capital stock for ad valorem taxation.

This Court, however, sustained the contention. Referring to *Choctaw O. & G. R. Co.* v. *Harrison, supra,* this Court in its opinion observed:

> "The law was held to be invalid as attempting to tax an instrumentality through which the United States was performing its duty to the Indians."

Continuing, this Court said:

> "The application of the case to that at bar needs no assisting comment. A tax upon the leases is a tax upon the power to make them, could be used to destroy the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, rather than by directly estimating them as the Board of Equalization and the referee did."

This Court thereupon concluded that "the assessment against the oil company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid."

Before the decision of this Court in *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra,* the Legislature of Oklahoma enacted Chapter 39, S. L. 1916, p. 102 (now Section 12434, Oklahoma Statutes 1931; Section 9814, Compiled Oklahoma Statutes, 1921), approved February 14, 1916. It was intended by the new Act to meet the objections to the former Act as applied to lessees operating on restricted Indian lands under authority of Congress. The new statute was based on the assumption that the *property* of a federal agency or instrumentality located in a State was subject to taxation therein. While the tax was in form a gross production tax, that is, a tax measured by the value of the oil when and as produced, it was declared to be a substitute for and in lieu of the general ad valorem tax on the taxable property of the producer. It was thought that such a tax would be sustained by this Court on the authority of *United Express Co.* v. *Minnesota,* 233 U. S. 335, wherein it was held in effect that while a State could not tax the receipts of a carrier derived from intaxable commerce as such, that a tax measured in part by such receipts, "in lieu of all taxes on its property," was valid.

The new Act, among other things, imposed a tax equal to ½ of 1 per cent of the gross value of asphalt and ores bearing lead, zinc, jack, gold, silver and copper products, and a tax equal to 3 per cent of the value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest, on every person, firm, associa-

tion or corporation engaged in the production within the State of such minerals and oil and gas. It was further provided in the statute:

> "The payment of the taxes herein imposed shall be in full and *in lieu of all taxes* by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper, or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; *and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced,* and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.
>
> "The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall take testimony to determine whether the taxes herein imposed are greater or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or

districts where the same is situated, including the value of oil, gas or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of, in and around any such well or mine, the value of the oil, gas, asphalt, or any of the said mineral ores produced and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said Board to said court; provided, that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered."

In four cases involving the tax on oil produced from restricted Indian lands under the provisions of the 1916 Act by lessees under leases of the kind involved in this case, the tax was held invalid by the District Court of the United States for the Western District of Oklahoma. The decision was affirmed by this Court in a memorandum. *Howard* v. *Oil Companies,* 247 U. S. 503.

Later the Supreme Court of the State had the same question before it in *Large Oil Co.* v. *Howard,* 63 Okla. 143, and reached the opposite conclusion.

The State Court in that case assented to the proposition (to which it has since adhered) that lessees of restricted Indian lands for oil and gas mining purposes, under leases approved by the Secretary of the Interior, are agen-

cies or instrumentalities of the Federal Government. In the opinion in that case it was said:

> "It is not open to question that the plaintiff in error and a large number of the oil producers in this State, alike situated, are to be deemed and considered in the discharge of the functions imposed upon them by the general government as a federal agent or instrumentality, through which the government discharges its duty to a considerable class of the Indians of the State, including the Osage Indians. *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292, 35 Sup. Ct. 27, 59 L. ed. 234; *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, 36 Sup. Ct. 453, 60 L. ed. 779."

That Court, however, asserted the proposition that the private property of such an agency owned by it and located in the State was subject to taxation therein. The gross production tax was held to be, as recited in the Act itself, a substitute for and in lieu of a general ad valorem tax on certain taxable property of the lessee, in which was included the oil for the tax year in which it was produced.

The decision in that case was reviewed by this Court on writ of error and reversed in a *per curiam* memorandum. *Large Oil Co.* v. *Howard,* 248 U. S. 549.

The inference from these *per curiam* decisions of this Court necessarily appears to be that this Court was of the opinion that not only was the lease or the value thereof as reflected in the capital stock of a corporate lessee not subject to taxation as held in *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra,* but also that the oil produced

pursuant to the lease (production is the thing that gives the principal value to the lease) was not subject to taxation by the State. This inference is made in view of the principle that a tax is not invalid because of the form, if it be in fact a substitute for and a just equivalent of a tax the State has the power to impose.

That such inference is fully justified appears from the next decision by this Court in the Gillespie case.

Following these *per curiam* decisions, the Supreme Court of the State again stated its views on the validity of the tax imposed by the 1916 Act on oil and other minerals produced by lessees as agencies or instrumentalities of the Federal Government. In the case of *In re Skelton Lead & Zinc Company's Gross Production Tax, 1919,* 81 Okla. 134, the Supreme Court of the State, in an elaborate opinion, reviewed all the authorities, and again asserted the power of the State to tax the property of such agencies and instrumentalities of the Federal Government, including "the lessee's private, personal share of mine products," and again sustained the tax, as a substitute and just equivalent for the ordinary tax upon such property.

This Court had in the meantime adopted the view that the gross production tax was a substitute for a general ad valorem tax on the property enumerated in the statute. *Shaffer* v. *Carter,* 252 U. S. 37, 57, 58.

In *State* v. *Gillespie,* 81 Okla. 103, the question was

raised as to "whether the State has power to levy a tax on incomes derived from the lessee's private personal share of oil and gas produced under departmental leases upon restricted Indian lands." Following its decision in *In re Skelton Lead & Zinc Co., supra,* the Court held that the "lessee's private share of the products from departmental leases upon restricted (Indian) lands," being subject to ad valorem taxation, that the income derived from the sale of such products was subject to taxation. If the premise that the oil was subject to ad valorem taxation had been sound, the conclusion that the proceeds of the sale of such oil was taxable as income would follow as a matter of course. That decision of the State Supreme Court was reviewed by this Court in *Gillespie* v. *State of Oklahoma,* 257 U. S. 501. In our judgment, the decision in that case affirms that which was indicated by the former *per curiam* opinion in the Howard cases; that is, that the lessee's share of the oil produced from restricted Indian lands pursuant to leases authorized by Act of Congress, is not subject to ad valorem tax by the State, and hence the gross production levied in lieu thereof in part, is invalid. For convenience, part of the opinion is here quoted, the portion believed to be particularly pertinent being italicised:

> "In *Choctaw, O. & G. R. Co.* v. *Harrison, supra,* it was held that such a lessee could not be taxed on the gross sales of coals from Choctaw and Chickasaw mines, when the tax was in addition to the taxes collected upon an ad valorem basis. In *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra,* it was held

that a similar lessee could not be taxed upon the value of an Osage oil lease. Subsequently the principle was applied *per curiam* to gross production taxes under a later statute of 1916, *without reference to the fact that the taxes, instead of being in addition to, were in lieu of, all taxes upon property rights. Howard* v. *Gypsy Oil Co.*, 247 U. S. 503, 62 L. ed. 1239, 38 Sup. Ct. Rep. 426; *Large Oil Co.* v. *Howard*, 248 U. S. 549, 63 L. ed. 416, 39 Sup. Ct. Rep. 183.

"The argument for the state is based primarily upon the cases sustaining taxes upon net income that include gains from interstate commerce (*Shaffer* v. *Carter*, 252 U. S. 37, 57, 64 L. ed. 445, 458, 40 Sup. Ct. Rep. 221; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748), when 'all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses' (*William E. Peck & Co.* v. *Love*, 247 U. S. 165, 175, 62 L. ed. 1049, 1052, 38 Sup. Ct. Rep. 432). *It is said also that tangible property within the state is subject to taxation, and that therefore the defendant's share of oil and gas cannot escape. If the cases that we have mentioned as decided per curiam tend to oppose the state's position, on the ground that, if the property is exempt, the income from it also is exempt, it is urged that, so far as appears, the distinction between the statute of 1916, then before the court, and the statutes dealt with by the authorities cited in those cases, was overlooked.*

"We cannot assume that there was the oversight supposed. The decision in 240 U. S. 522, that such leases were not taxable, went on general principles, not on the nature of the particular statute, and in *Shaffer* v. *Carter*, 252 U. S. 37, 48, 64 L. ed. 445, 454, 40 Sup. Ct. Rep. 221, a case that adverted to the distinction relied upon, pp. 57, 58, the decisions *per curiam* were referred to as decided upon the merits. *Those decisions appear to us to have been correct.* The criterion of interference by the states with interstate commerce is one degree.

It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the states are to exist and make laws. *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Diamond Glue Co.* v. *United States Glue Co.,* 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206. *The rule as to instrumentalities of the United States, on the other hand, is absolute in form and at least stricter in substance. Williams* v. *Talladega,* 226 U. S. 404, 416, 417, 419, 57 L. ed. 275, 280, 281, 33 Sup. Ct. Rep. 116; *Johnson* v. *Maryland,* 254 U. S. 51, 55, 65 L. ed. 126, 128, 41 Sup. Ct. Rep. 16. 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' 240 U. S. 530. *The step from this to the invalidity of the tax upon income from the leases is not long.*

"In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void (*Pollock* v. *Farmers Loan & T. Co.,* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912)—a rule lately illustrated by *Evans* v. *Gore,* 253 U. S. 245, 64 L. ed. 887, 11 A. L. R. 519, 40 Sup. Ct. Rep. 550, and applied in a case somewhat like the present by the Supreme Court of Hawaii (*Oahu R. & Land Co.* v. *Pratt,* 14 Haw. 126). Whether this property could be taxed in any other form or not, it cannot be reached as profits or income from leases such as those before us. The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases; and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards. *Western* v. *Charleston,* 2 Pet. 449, 468, 7 L. ed. 481, 488. The taxation of cattle grazing in Indian lands, held valid in *Thomas* v. *Gay,* 169 U. S. 264,

273, 42 L. ed. 710, 714, 18 Sup. Ct. Rep. 340, obviously is more remote."

It is clear under the decision in *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra,* the leases on restricted Indian land executed pursuant to Act of Congress may not be taxed ad valorem, either by directly assessing the tax upon the leases themselves, or indirectly by including the value thereof in determining the value of the capital stock of a corporation for assessment for ad valorem taxation. It seems equally clear that under the *per curiam* decisions in Howard v. Oil Companies and Large Oil Co. v. Howard that the share of the lessee in the production from the restricted Indian land by virtue of such leases thereon is not subject to ad valorem taxation, because otherwise the gross production tax in lieu of and a just equivalent for a general ad valorem tax thereon in the tax year in which it was produced would have been sustained. It certainly cannot now be questioned that the income from the sale of oil produced under such a lease cannot be taxed by the State, for the reason as stated in the Gillespie case, such a tax is in effect a tax on the lease itself. The lease itself cannot be taxed by the State, for to admit the power to tax it is to admit the power to destroy the power to make it. It was very pertinently observed by this Court that the step is not a long one from the invalidity of a tax on the lease to the invalidity of a tax on the income therefrom. But intermediate the lease and the income derived from

the sale of the oil produced is the oil itself. If the income derived from the *sale* of the oil is immune, the *oil* from which the income is derived must necessarily be immune. The same considerations which invalidate a tax upon the leases and invalidates a tax upon the profits of leases, must necessarily invalidate an ad valorem tax on the oil produced from the lease. It cannot be material whether the thing taxed is the product itself or the proceeds of the sale thereof. A tax on the oil itself, either by way of a gross production tax imposed in lieu of a general ad valorem tax thereon or a direct ad valorem tax, hampers the effort of the United States to make the best terms possible for its wards, fully as much as a tax on the income derived from the sale of the oil. It must be true that if a gross production tax cannot be imposed in lieu of a general ad valorem tax and which is restricted to a just equivalent for a general ad valorem tax, that the oil itself cannot be subjected to a direct general ad valorem tax. It cannot be of any consequence whether the ad valorem tax, or the substitute therefor, be imposed for the tax year in which the oil is produced, or for some subsequent tax year, so long as the oil remains in the hands of the lessee in its original state, awaiting an opportunity to market it. Lessees must in the interests of their lessors, as well as their own, produce the oil from the leased lands to protect against drainage through wells on adjacent premises. When the production from a field exceeds the market outlet, as it did during the

time the oil in question was produced, the lessee has no option but to store it and hold it until a market can be had.

It is not disputed that the 51,630 barrels of crude oil in storage was in fact produced by petitioner from restricted Indian lands under leases executed pursuant to Act of Congress to secure the development of the lands and obtain for the benefit of the restricted Indians a percentage of the gross oil produced. The remainder going to the petitioners as its compensation for the service rendered, of which the oil in question is a part. If this 51,630 barrels of oil had been sold in the year in which it was produced, or in any year subsequent thereto, the State of Oklahoma could not have imposed a tax of any nature upon the proceeds derived from the sale. So much is clear and cannot be disputed. But the oil has not been sold. It is stored in its original state awaiting an opportunity to market it and turn it into money. If the proceeds of sale when ultimately realized cannot be taxed, how can the oil itself be taxed in the meantime? Until sold the oil represents the income of the lessee from the lease, as much so as the proceeds when sold. If it cannot be taxed in its converted form, certainly it cannot in its original form. If a tax of a percentage of the proceeds of sale of the oil, as income, tends to hamper the United States in execution of its obligation to its Indian wards, clearly a tax of a percentage of the value of the oil before sale has a like effect. This Court has so determined. It will be recalled that while the gross production tax laid on lead and

zinc ores, oil and other minerals is in lieu of a general ad valorem tax on the products themselves in the tax year in which they are produced, as well as other property, the act specifically provides that:

> "* * * oil in storage, asphalt and ores bearing minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

It is under that provision of the statute that the tax authorities of the State sought to list and assess the oil in question in the manner provided in other statutes for assessing property for ad valorem taxation. Under that provision the State tax authorities assessed certain lead and zinc ores of the Jaybird Mining Company produced from the lands of a restricted Indian under a lease executed pursuant to similar congressional authority in the year 1920, and on hand on January 1, 1921, as of which date the property was assessed for the tax year subsequent to that in which the ore was produced. The State Supreme Court held that the property was subject to such assessment for general ad valorem taxation. *Weir* v. *Jaybird Mining Co.*, 104 Okla. 271. The decision was reviewed by this Court on writ of error. *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609. After reviewing the foregoing and other decisions, this Court said:

"In this case the lease was made to secure the de-

velopment of the lands and obtain for the benefit of the restricted Indian owners a percentage of the gross proceeds of the ores to be mined. The ad valorem tax here in controversy was assessed on the ores in mass at the mine before sale, and that was an attempt to tax an agency of the Federal government within the principle of the cases cited."

The State Court in the opinion in the instant case (13 Pac. [2d] 586) cited and undertook to distinguish the decision referred to. In the opinion it was stated:

> "In *Jaybird Mining Co.* v. *Weir, County Treas.*, 271 U. S. 609, 46 S. Ct. 592, 70 L. ed. 1112, there was involved the question of whether an ad valorem tax could be levied upon lead and zinc ore extracted from restricted Indian land and stored in bins on the premises from which the ore had been extracted. This court held that the property was subject to the state ad valorem tax. *Weir, County Treas.* v. *Jaybird Mining Co.*, 104 Okla. 271, 232 Pac. 425. That judgment was reversed by the Supreme Court of the United States in the above-cited case. That court held that the lessee's individual part of the ore was exempt from taxation.
>
> "If the oil sought to be taxed in this case had been stored on the premises from which it had been produced, and if it had not been separated from the portion belonging to the lessor, under the rule stated in the Jaybird case, it would be exempt from ad valorem taxation. That rule is not applicable to the facts in this case, which show that the portion of the oil produced, which belonged to the lessor, had been delivered to the Superintendent of the Five Civilized Tribes for the benefit of the lessor, and that the lessor owned no part of the oil in storage."

In the opinion rendered the same day in another case, in which the same question was involved (*Board of County*

Commissioners of Payne Co. v. *Indian Territory Illuminating Oil Co.*, 14 Pac. [2d] 929, and now pending in this Court as No. 357), the Court adverted to the fact that the oil involved in that case had been removed from the premises where produced and commingled in common storage tanks with other oil of like grade and quality upon which the tax exemption was not claimed.

It is true that the ore involved in the Jaybird Mining case was being held in wooden bins on the leased premises and that the share of the Indian lessor had not been physically segregated, while in this case the oil had been removed from the premises where produced and held in storage in steel tanks, in some of which at least other oil of like grade and quality was stored, and the interest of the lessor had been separated. It is impossible to distinguish the cases in principle, on account of the differences adverted to, any more than because in one case the ores were stored in wooden bins and in the other the oil was stored in steel tanks.

The fact that the lessee had not settled with the Indian lessor for royalties on the ores involved in the Jaybird Mining case at the time of the assessment has no apparent significance. The ores belonged to the mining company, and the State was seeking to assess property belonging to it, and not property belonging to the restricted Indian. The decision by this Court did not turn on the right of the State to tax property of a restricted Indian, or the interest of

such Indian in property, but turned on the power of the State to tax as the property of the lessee the ores mined by it pursuant to the lease. The ores involved in the former case, as well as the oil involved in the present case, was personal property. Neither the ores nor the oil was a part of the realty. It is immaterial whether the land on which they were held in storage, were unrestricted or restricted and hence taxable or not. The question of whether the ores in the former case, or the oils in the instant cases are subject to ad valorem taxation turns upon their source and not the place within the State they may happen to be at the time of the assessment. The fact that property may be commingled with other property of like kind, does not relieve it from any burden imposed by law (*Harrington* v. *United States,* 11 Wall. 356), or deprive it of any exemption or privilege to which it is entitled by law. *First Nat. Bank of Cushing* v. *Funnell,* 144 Okla. 188; *Holmes* v. *Marshall,* 145 Cal. 777, 79 Pac. 534, 104 A. S. R. 86, 91; *State* v. *Northwestern Elevator Co.,* 101 Minn. 192, 112 N. W. 68; *Edgewood Distilling Co.* v. *Rosser's Admr.,* 116 Va. 624, 82 S. E. 716; *Apponoose County* v. *Henke,* 207 Ia. 835, 223 N. W. 876; *Colley* v. *H. L. Edwards Co.,* 258 S. W. 191.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its super-

visory powers, and that if this Court has not jurisdiction to review the decision of the Supreme Court of Oklahoma by appeal, that to such an end a writ of certiorari should be granted, and the decision finally reversed.

JOHN H. MILEY,
Counsel for Petitioner.

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NO. 356

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY, *Petitioner*,

VERSUS

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, *Respondent*.

SUPPLEMENTAL BRIEF OF PETITIONER

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Utterback Typesetting Co., Law Brief Printers, 17 S. Walker, Oklahoma City, 3-8750

INDEX

Page

STATEMENT 1

JURISDICTION 3

SPECIFICATION OF ERRORS 3

ARGUMENT 3

Point One: The petitioner as lessee of restricted Seminole Indian lands, under leases approved by the Secretary of the Interior pursuant to rules and regulations prescribed by him, is an agency or instrumentality employed by the Government of the United States in performing the governmental duties it has assumed to its Indian wards for the development of their allotted lands for oil and gas and the production of the same therefrom for their benefit 4

Point Two: The states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control or affect, in the slightest degree, the operation of the constitutional laws enacted by Congress for the purpose of carrying into execution the powers vested in the government of the United States, and cannot tax to any extent the instrumentalities and agencies of the Federal Government, nor the means employed by Congress to carry into effect the powers conferred by the Federal Constitution; and any tax imposed or any attempt to impose a tax therefor or thereon, no matter how reasonable or how universal and undiscriminating, is repugnant to the Constitution of the United States 5

Point Three: The rule which obtains in Oklahoma, is that while a lease of land for oil and gas mining purposes does not vest in the lessee title to the oil and gas in place, it does grant to the lessee an interest in the land 6

Point Four: Although the leases by which petitioner is authorized to develop the restricted Indian lands and produce oil therefrom, are property within the territorial jurisdiction of the State, they may not be directly taxed as such by the State. "A tax upon the leases is a tax upon the power to make them and could be used to destroy the power to make them." 6

Point Five: The net income derived by a lessee from sales of his share of the oil received under such leases is not subject to taxation 7

Point Six: A tax on the gross value of the share of a lessee of restricted Indian lands, of the oil produced, would retard, impede and burden the United States in the exercise of its governmental functions, in a greater degree and in a more direct manner, than would a tax on the net income derived from sales of his share thereof 9

Point Seven: The interest in the land vested in the lessee by the oil and gas leases. Not being subject to taxation by the State without the consent of Congress, the issues and profits of the leases are likewise not subject to such taxation 14

Point Eight: The decision in Jaybird Mining Company v. Weir cannot be distinguished in principle and is decisive of this case 23

1. Storage elsewhere than on the leased premises is immaterial 26
2. It is immaterial that the Indians had no interest in the oil sought to be taxed, and that settlement has been made for their royalty or equitable interests 28
3. The fact that the oil in question has been commingled in common storage with other oil is immaterial 31

CONCLUSION 35

Table of Cases Cited

Page

Brewster v. Lanyon Zine Co., 72 C. C. A. 213, 140 Fed. 801 12
Brown v. Maryland, 12 Wheat. 419 5
Burnet v. Coronado Oil & Gas Co., 285 U. S. 393 7

California v. Central P. R. Co., 127 U. S. 1 5
Carpenter v. Shaw, 280 U. S. 363 ..... 14, 30
Champlin Refining Co. v. Corporation Commission, 286 U. S. 210 12
Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292 ..... 4, 17
Clark v. Slick Oil Co., 88 Okla. 55 33

Dalton v. Bilbo, 126 Okla. 139 33

Elliott Jones & Co. v. Waurika Oil Association, 253 S. W. 601 34
Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265 34

Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217 10
Gillespie v. Oklahoma, 257 U. S. 501 ..... 5, 5, 7
Great Southern Gas Co. v. Logan Nat. Gas Co., 83 C. C. A. 574 33

Hentz v. The Idaho, 93 U. S. 575 33
Howard v. Oil Companies, 247 U. S. 503 ..... 4, 7, 14, 16, 22

In re Oklahoma National Life Insurance Co., 68 Okla. 219 32
In re Skelton Lead Zinc Company's Gross Production Tax, 81 Okla. 134 .. 5
Indian Territory Illuminating Oil Co. v. Oklahoma,
240 U. S. 522 ..... 5, 5, 6, 16, 17, 18, 19, 32

Jaybird Mining Co. v. Weir, 271 U. S. 609 ..... 4, 5, 14, 23
Johnson v. Maryland, 254 U. S. 51 ..... 5, 22

Large Oil Co. v. Howard, 248 U. S. 549 ..... 4, 7, 14
Large Oil Co. v. Howard, 63 Okla. 143 ..... 4, 16, 22

McCulloch v. Maryland, 4 Wheat. 143 5

New York ex rel Bank of Commerce v. Tax Coms., 2 Black. 620 5

Ohio Oil Co. v. Indiana, 177 U. S. 190 11

Peoples Natural Gas Co. v. Public Serv. Comm. of Penn., 270 U. S. 550 34
Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326 10
Pollock v Farmers L. & T. Co., 157 U. S. 429 14

Ramsey v. Rodenburg, 72 Colo. 567 33
Rich v. Doneghey, 71 Okla. 204 6

Shaffer v. Carter, 252 U. S. 37 17
Smith v. Linden, 91 S. E. 167 34
Somers v. Kane, 168 Minn. 420 33
Sothern Oil Co. v. Waggoner, 276 Fed. 487 34
St. Paul Broom Co. v. Kemp, 125 Wis. 138 33

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 10
United States Glue Co. v. Oak Creek, 247 U. S. 321 9

Van Brocklin v. Tennessee, 117 U. S. 151 5
Vest v. Bond Bros., 223 Ala. 552 33

Waggoner Estate v. Wichita County, 3 Fed. (2d) 962 33
Weston v. Charleston, 2 Pet. 449 5

Table of Statutes Cited

Act of May 27, 1908, Sec. 2 4
Act of May 10, 1928, Ch. 517 (45 Stat. L. 495, as amended by Act of Feb. 14, 1931 (46 Stat. L., Ch. 179) 8
Compiled Oklahoma Statutes 1921, Sec. 9627 ..... 31, 32
Compiled Oklahoma Statutes 1921, Sec. 9814 ..... 15, 20, 24, 29

NO. 356

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY, *Petitioner,*

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, *Respondent.*

SUPPLEMENTAL BRIEF OF PETITIONER

STATEMENT

Petitioner adopts its Brief in Support of Papers Whereon Appeal Was Allowed as Petition for Writ of Certiorari, as herein supplemented, as its brief on the merits.

The question involved is whether 51,630 barrels of crude oil of the petitioner contained in certain storage tanks located in Tulsa County, Oklahoma, on January 1, 1929, was subject to assessment for ad valorem taxation by the State of Oklahoma and the municipalities thereof, for the year 1929 (R. 31). The crude oil involved constitutes the petitioner's share of oil (seven-eighths of the whole) which was produced by the petitioner from the allotted lands of certain restricted Seminole Indians (one of the Five Civilized Tribes) under leases approved by the Secretary of the

Interior under rules and regulations approved by him pursuant to Section 2 of the Act of May 27, 1908 (See Appendix V). The leases were all in the same form. One of them appears in the record (p. 21). The crude oil was produced during the period from March 31, 1927, to June 16, 1927, and was run into the storage tanks located in Tulsa County, which tanks were purchased on March 14, 1927, for the purpose of storing such oil and also other oil. On January 1, 1929, the tanks contained 172,747 barrels.

The 121,117 barrels of oil contained in the tanks in addition to the 51,630 barrels here involved, included the Indians' share (one-eighth of the whole) produced from the restricted land, which has been acquired by petitioner by settlement with the Superintendent of the Five Civilized Tribes, and all that which had been produced by petitioner from other lands under leases, known as "commercial leases," over which the United States Government had no control. It is not claimed that the oil contained in the tanks other than petitioner's share of that produced from the restricted Indian lands was not subject to taxation. Such other oil, including the share originally belonging to the Indians, was all regularly listed by the petitioner for taxation, assessed and the taxes levied thereon paid without protest.

It is the contention of the petitioner that under the leases approved by the Secretary of the Interior, it became an agency or instrumentality of the Government of

the United States for the development and use of the restricted land of its Indian wards for their benefit, and the 51,630 barrels of crude oil being the petitioner's share of the product specified in the leases, could not be lawfully taxed by the State while held by the petitioner in its original form prior to sale.

The petitioner's contention was sustained by the State District Court (R. 30). But on appeal the State Supreme Court held the oil involved subject to taxation by the State (R. 38).

THE JURISDICTION

This Court having granted a writ of certiorari to review the decision of the Supreme Court of the State, it is unnecessary to give further consideration to jurisdictional questions.

SPECIFICATION OF ERRORS

The specification of errors relied upon for reversal has been quoted at pages 13 to 16 of Brief in Support of Petition for Writ of Certiorari.

ARGUMENT

Supplementing the argument on the merits contained in the Brief in Support of Petition for Writ of Certiorari heretofore filed herein, it is respectfully submitted:

Point One

The petitioner as lessee of restricted Seminole Indian lands, under leases approved by the Secretary of the Interior pursuant to rules and regulations prescribed by him, is an agency or instrumentality employed by the Government of the United States in performing the governmental duties it has assumed to its Indian wards for the development of their allotted lands for oil and gas and the production of the same therefrom for their benefit.

Act May 27, 1908 (35 Stat. L. 312) (Appendix V);

Jaybird Mining Co. v. *Weir,* 271 U. S. 609;

Gillespie v. *Oklahoma,* 257 U. S. 501;

Indian Territory Illuminating Oil Co. v. *Oklahoma,* 240 U. S. 522;

Choctaw O. & G. R. Co. v. *Harrison,* 235 U. S. 292.

See, also:

Large Oil Co. v. *Howard,* 248 U. S. 549;

Howard v. *Oil Companies,* 247 U. S. 503.

The Supreme Court of the State so holds:

Large Oil Co. v. *Howard,* 63 Okla. 144, 145;

In re. Skelton Lead & Zinc Company's Gross Production Tax, 81 Okla. 135, 138.

COMMENT:

Some of the leases involved in *Howard* v. *Oil Companies,* 247 U. S. 503, were in the same form and executed under the same authority. Some of the leases from which the net income involved in *Gillespie* v. *Oklahoma,* 257 U. S.

501, were upon Creek Indian lands which were under the same restrictions as those imposed on Seminole Indians by the Act of May 27, 1908, and those leases were executed by authority of the same Act as the leases here involved.

Point Two

The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control or affect, in the slightest degree, the operation of the constitutional laws enacted by Congress for the purpose of carrying into execution the powers vested in the Government of the United States, and cannot tax to any extent the instrumentalities and agencies of the Federal Government, nor the means employed by Congress to carry into effect the powers conferred by the Federal Constitution; and any tax imposed or any attempt to impose a tax therefor or thereon, no matter how reasonable or how universal and undiscriminating, is repugnant to the Constitution of the United States.

M'Culloch v. *Maryland,* 4 Wheat. 316;

Weston v. *Charleston,* 2 Pet. 449;

Brown v. *Maryland,* 12 Wheat. 419;

New York ex rel Bank of Commerce v. *Tax Coms.,* 2 Black. 620;

Van Brocklin v. *Tennessee,* 117 U. S. 151;

California v. *Central P. R. Co.,* 127 U. S. 292;

Indian Territory Illuminating Oil Co. v. *Oklahoma,* 240 U. S. 522;

Johnson v. *Maryland,* 254 U. S. 51;

Gillespie v. *Oklahoma,* 257 U. S. 501;

Jaybird Mining Co. v. *Weir,* 271 U. S. 609.

In *Johnson* v. *State of Maryland,* 254 U. S. 51, 55, re-

ferring to the powers of the State over Federal agencies or instrumentalities, this Court said:

> "With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *McCulloch* v. *Maryland,* 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the States to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today. *Farmers & M. Sav. Bank* v. *Minnesota,* 232 U. S. 516, 525, 526."

Point Three

The rule which obtains in Oklahoma, is that while a lease of land for oil and gas mining purposes does not vest in the lessee title to the oil and gas in place, it does grant to the lessee an interest in the land.

Rich v. *Doneghey,* 71 Okla. 204, 3 A. L. R. 352.

Point Four

Although the leases by which petitioner is authorized to develop the restricted Indian lands and produce oil therefrom, are property within the territorial jurisdiction of the State, they may not be directly taxed as such by the State. "A tax upon the leases is a tax upon the power to make them and could be used to destroy the power to make them."

Indian Territory Illuminating Oil Company v. *Oklahoma,* 240 U. S. 522, 530.

Point Five

The net income derived by a lessee from the sales of his share of the oil received under such leases is not subject to taxation.

Gillespie v. *State of Oklahoma,* 257 U. S. 501;

Burnet v. *Coronado Oil & Gas Company,* 285 U. S. 393.

COMMENT:

It is well settled that a tax on the income of property is a tax upon the property itself. The decision of this Court on the point stated, would seem to be the inevitable conclusion from the decision in *Indian Territory Illuminating Oil Co.* v. *State of Oklahoma,* 240 U. S. 522, rendered in 1916, holding that the power of the State to directly tax such leases without the consent of Congress cannot be admitted. It was pointed out in the opinion of the court in the Burnet case, that "the opinion in Gillespie vs. Oklahoma, * * * has often been referred to as the expression of an accepted principle." Eleven of the decisions of this Court so accepting the principle were cited.

In dissenting opinions it was said that the decision in the Gillespie case should be overruled. We respectfully suggest that such cannot consistently be done, without also overruling *Indian Territory Illuminating Oil Co.* v. *State, supra; Howard* v. *Gypsy Oil Co.,* 247 U. S. 503, and *Large Oil Co.* v. *Howard,* 248 U. S. 549. The wisdom of the gen-

eral policy of *stare decisis,* even where the error is a matter of serious concern, will not be questioned. It has been suggested, however, that where a correction cannot be had by legislation as in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. In that connection may we respectfully call attention to the fact that it is an easy matter to permit state taxation of Federal agencies and instrumentalities by legislative action. All that is required is an Act of Congress. Congress has given such consent, as to minerals produced from restricted Indian lands of the Five Civilized Tribes subsequent to April 26, 1931, by Act of May 10, 1928, 45 Stat. L. 495, as amended by 46 Stat. L. Ch. 179 (Appendix VI). Under that act oil now produced from restricted Indian lands of the Five Civilized Tribes by lessees as agencies or instrumentalities of the Federal Government and the net income therefrom is subject to and is taxed by the State. Similar legislation has been enacted as to other tribes. See Sec. 5, Ch. 120, 41 Stat. L. 1250.

Overruling any of these decisions would have no practical effect so far as future production and incomes derived therefrom is concerned. The only appreciable effect would perhaps be to open the way to very large numbers of claims for back taxes on gross production, oil in tankage on the leased premises and incomes, that have been regarded as definitely settled by these decisions for from ten to sixteen

years. We respectfully submit that the wisdom of adherence to the policy of *stare decisis* under these circumstances should commend itself to those who now entertain a contrary opinion to that heretofore entertained and expressed by a majority of the Court.

Point Six

A tax on the gross value of the share of a lessee of restricted Indian lands, of the oil produced, would retard, impede and burden the United States in the exercise of its governmental function, in a greater degree and in a more direct manner, than would a tax on the net income derived from sales of his share thereof.

COMMENT:

It is manifest that a tax laid upon the gross value of oil produced, may be more burdensome than a tax laid on the net income from the sales of such oil, which is the gross receipts therefrom, less all proper development and operating costs, depletion allowances, depreciation and the like. Taxation of net incomes cannot exceed in amount the profits realized, while taxation of the gross value of oil produced may be extended to such limits that production could only be had at an actual loss and thus force abandonment thereof to the detriment of the Indian wards of the Government.

In *United States Glue Company* v. *Oak Creek*, 247 U. S. 321, 328, this Court said:

"The difference in effect between a tax measured by

> gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

It is evident that a tax on the gross value of the lessee's share of oil and gas produced under an oil and gas mining lease is a tax upon the gross income or gross receipts of the lease. A tax on the gross receipts arising from the conduct of interstate commerce has been held invalid because it is a direct burden on such commerce and could be used to destroy it (*Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *G H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217), while a tax on the net income arising from the conduct of interstate commerce has been allowed on the theory that at most it is only a remote burden on such commerce (*Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113). If the same rule should be applied to agencies or instrumentalities of the Federal Government, it might result in the conclusion that a tax on the net income of a lessee from sales of his share of the oil and gas produced would not be an unwarranted interference with the functions of the Federal

Government upon the part of the State, but would certainly result in the conclusion that a tax upon the gross value of the lessee's share of the oil would be a direct burden and could be used to destroy the power of the Government to secure development of the lands of its Indian wards through the instrumentality of lessees.

In the Gillespie case this Court pointed out that it is well understood that a certain amount of reaction upon and interference with interstate commerce cannot be avoided if the states are to exist and make laws and that the criterion of interference by the states with interstate commerce is one of degree. In holding that the rules with reference to interference with interstate commerce were not applicable to instrumentalities of the United States, this Court held in the Gillespie case that the rule as to such instrumentalities is absolute in form and at least stricter in substance than the rule as to interstate commerce. The court, therefore, concluded in effect in the Gillespie case, that although the tax on the net income of a lessee from sales of oil and gas produced was less in degree and more remote than a tax upon the gross receipts (the gross value of oil produced), such tax could not be imposed by the State.

In yet another way would the burden be more direct and greater in degree. On account of the fugacious nature of oil and gas, as aptly described by this Court in *Ohio Oil Co.* v. *Indiana*, 177 U. S. 109, the owner of the land overlying an oil and gas pool, in order to recover his share of the

oil and gas must not only have a number of wells on his side of the dividing property line equal to those on the opposite side, but they must also be operated to the same extent as the wells on the adjacent properties.

The characteristic of oil and gas mentioned, has given rise to what are known as the implied covenants of those oil and gas leases in which the lessor receives a share of the product, which, in the absence of controlling express covenants, are recognized by the courts without exception. Among the implied covenants, as universally recognized, are the implied covenant to fully develop, to protect the leased premises from drainage by drilling offset wells, and for diligent and proper operation. See *Brewster* v. *Lanyon Zinc Co.*, 72 C. C. A. 213, 140 Fed. 801.

Ordinarily when transportation and marketing facilities and market demands are adequate, no difficulty arises over the covenant for diligent and proper operation. It is usually as much to the interest of the lessee as to the lessor to produce and market all the oil he can. But under conditions that have prevailed in this country for the past few years, and particularly in the Seminole field in Oklahoma during the period shortly prior to the application and enforcement of the State's proration laws (See *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210) when the oil in question was produced, production of oil far exceeded the market demands. Non-integrated producers of oil, such as the petitioner, who are without refineries, and

dependent on the general market for disposition of their product, were then compelled to either permit the premises leased by them to be drained, or produce the oil as rapidly as others and store it above ground until it could be marketed. It was of course to the interest of the United States under such circumstances in the discharge of its obligation to its Indian wards, that loss by drainage be not suffered, but that the oil be produced, run into storage, and settlement made for the Indian's share. Anything which would burden or hamper such production and storage, would necessarily interfere with the performance of the governmental function of fully protecting the interest of the Indian ward. At best the storage of oil is not an attrative proposition for a producer. The proper storage facilities are expen sive. In the most modern steel tankage there is some loss by evaporation, and deterioration in quality. Capital investment in the oil and the storage facilities are frozen and bring no returns. Non-integrated producers, produce and store oil above ground as a matter of necessity to prevent loss by drainage. It would be far more economical and profitable to them if the oil could be left in the ground, and not produced until there is an available market. Taxation of oil stored under such circumstances during the period it must be held until the lessee has an opportunity to market it, amounting in these cases to thousands of dollars per year, is no mere theoretical burden on an agency or instrumentality of the Federal Government. Added to the

other disadvantages of above ground storage, it might very well deter a prudent lessee from producing and storing the oil, and thus incur the risk of loss to himself and his lessor by drainage. The burden of such a tax is more substantial and direct than a tax on the net income derived by the lessee from the sale of oil currently produced. It is very clear that the effect of the tax here imposed upon the instrumentality of the United States is more direct than the tax on net income condemned in the Gillespie case. Of the two taxes, there can be no doubt that the tax on net income is the more remote.

Point Seven

The interest in the land vested in the lessee by the oil and gas leases. Not being subject to taxation by the State without the consent of Congress, the issues and profits of the leases are likewise not subject to such taxation.

Pollock v. *Farmers L. & T. Co.*, 157 U. S. 429;
Carpenter v. *Shaw*, 280 U. S. 363;
Howard v. *Oil Companies*, 247 U. S. 503;
Large Oil Co. v. *Howard*, 248 U. S. 549;
Jaybird Mining Co. v. *Weir*, 271 U. S. 609.

COMMENT:

We submit that had the power of the State to tax the net income without the consent of Congress been sustained, that nevertheless the power to levy the tax now in question, without such consent, must be denied.

The general principle here sought to be applied is well settled. It was applied in Carpenter vs. Shaw. In that case the petitioners were Choctaw Indians of less than half blood, and all restrictions on their allotted lands had been removed by the Act of May 27, 1908. However, the Atoka agreement, under which their lands were allotted, provided that the same should be non-taxable while title remained in the original allottees, not to exceed twenty-one years from date of patent, which could not be abrogated by subsequent legislation. The petitioners leased their allotted lands for oil and gas mining purposes, receiving a share of the oil and gas produced, called "royalty." The State sought to tax the royalty under the provisions of Section 9814, C. O. S. 1921 (Appendix 1), which imposed a tax of 3 per cent of the value of all oil and gas produced, to be paid by the producer (usually a lessee) on all except the royalty interest. It was provided that the owner of the royalty interest should pay the tax thereon. The statute provided that the payment of such taxes should be "in full and in lieu of all taxes * * * upon any property rights attached to or inherent in the right to said minerals, upon leases * * * upon the mining rights and privileges * * * belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well * * * or any mine * * * and actually used in the operation of such well or mine; and also *upon the oil, * * * during the tax year in which the same is produced,* and upon any invest-

ment in any of the leases, rights, privileges, minerals or property * * * mentioned." The State contended that the tax was not upon the exempt land, from which the oil was produced, but was upon the oil after severance as personal property which had not been exempted from taxation as such. This Court rejected the contention and held that the land being exempt from taxation by the State, the owner's share of the oil produced therefrom was not subject to the tax.

If it be granted, as held in *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, *supra*, that the interest in the land created by leases of restricted Indian lands are not subject to taxation by the State, it must necessarily follow, for the same reason, that the lessee's share of the oil severed and produced is not subject to such taxation.

Section 9814, *supra*, insofar as it related to the tax on the share of the oil other than the royalty interest, was considered by this Court in *Howrad* v. *Oil Companies*, and *Large Oil Co.* v. *Howard*, *supra*. The Supreme Court of the State had construed the statute in *Large Oil Co.* v. *Howard*, 63 Okla. 143, and held that the tax imposed was in lieu of and a substitute for an ad valorem tax on property, among others being, as expressed in the statute, upon the oil in the year in which it was produced, and since the property of a federal agency or instrumentality had been held subject to taxation by the State, that Court concluded that the tax upon the share of the producer (lessee) was

valid, even though the lessee was such agency or instrumentality. This Court, however, in memorandum decisions held the tax was invalid upon the authority of *Choctaw O. & G. R. Co.* v. *Harrison, supra,* and *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra.* In *Shaffer* v. *Carter,* 252 U. S. 37, this Court stated that it was clear, as a matter of construction that the gross production tax was intended as a substitute for the ad valorem property tax. In Gillespie vs. Oklahoma, this Court reviewed the previous decisions and stated in the opinion that the decision in Indian Territory Illuminating Oil Co. vs. Oklahoma, that such leases were not taxable by the State, went on general principles, and not on the nature of the particular statute. It was also stated that it was not to be assumed that in deciding Howard vs. Oil Companies and Large Oil Co. vs. Howard, that the Court overlooked the difference between the statutes involved in those cases and Choctaw O. & G. R. Co. vs. Harrison. In the opinion it was said: "Those decisions appear to us to have been correct."

The effect of those memorandum decisions is that, the share of the oil of the lessee under such leases, is not subject to ad valorem taxation by the State at least in the year in which it was produced, otherwise the tax levied in lieu of and as a substitute for an ad valorem tax on such oil for such year would have been sustained as valid, at least to the extent that it was a substitute therefor.

Without regard to these decisions, the correctness of

the proposition now asserted, must be apparent on general principles. Certainly it will not now be denied that "the power to tax is the power to destroy." It seems axiomatic that if the power exists in the State to lay an ad valorem tax on the leases as property, the State has it within its power to seriously impair and hinder, if not to destroy the power of the Federal Government to make them. Hence it was that this Court denied the power of the State to so impair or impede the United States in the exercise of its governmental function in *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra.* The correctness of that decision seems clear. It does not appear that it has been since questioned in any quarter. The only inducement to a lessee to develop the land for oil and gas is the share of the oil and gas he hopes to secure under the terms of the lease.

The only element of actual value of the lease to the lessee is the value of the share of the oil and gas which he receives. An undeveloped oil and gas lease has no value except such as the prospect of discovering oil and gas thereon may give it. A developed lease has such value only as the production secured therefrom and expected to be secured may give it. Generally speaking, oil and gas leases are executed for short terms and the term of the lease depends upon the continuation of production. When the production ceases, the lease terminates and its value is gone. Under the usual terms of an oil and gas lease no rights are given or granted to the land or the use of the surface of

the land except such as are necessarily incidental to the development of the property for oil and gas. If wells are drilled and no production is found, then such rights are valueless. If production is found and the wells become exhausted, the rights under the lease cease to have value. Such is the nature of the leases under which the crude oil in question was produced. From the very nature of the business, each day's operation of a developed and producing lease decreases the value of the lease. The taking of oil and gas is the taking of the substance which gives value to the lease, and when the oil and gas are exhausted the lease terminates and has no vlaue. Hence a tax on the production from the lease is a tax on the only substance which gives the lease value, and is therefore the equivalent of a tax on the lease itself, just as was held by this Court in the case of *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra,* where the State sought to tax the value of the capital stock of the corporation. To tax the oil produced under a lease, either at the moment of production, or at any subsequent time, amounts in substance and fact to a tax on the lease. To admit the power of the State to tax the share of the lessee of the oil and gas produced, is to admit the power of the State to hamper and impede, if not to destroy, the power of the United States to make the lease, to no less extent or in no less degree than to admit the power to tax the lease itself. There can be no doubt that the State is without power to lay an ad valorem tax on such leases

directly, or by including their value in the value of capital and surplus against which such tax is laid, and is for the same reason without power to impose such tax upon the lessee's share of the oil and gas produced thereunder. So much is settled by the decisions of this Court. In the cases so far discussed, the Court was dealing with a tax on the oil in the year in which it was produced. The principle involved as to a tax imposed in a subsequent year is the same.

The statute (Section 9814, Appendix 1), which was considered in the foregoing cases as applied to taxation of oil in the year in which produced, further provides for taxation in the next and subsequent years, as follows:

> "Oil in storage, asphalt and ores bearing minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property, within the taxing district in which such property is situated at the time."

It is under this provision that the tax authorities of the State assert the right to assess the oil in question for taxation. The time and manner of making the assessment being prescribed by the other statutes quoted in the appendix.

If oil produced by an agency or instrumentality of the Federal Government, on the 2nd day of January of any year and retained by him in its original form throughout the remainder of the year, is not subject to taxation by

the State in any form or manner during that year, without the consent of Congress, as clearly held by the decisions of this Court, for what reason can the same oil become subject to taxation because it is still on hand January first of the succeeding year? For the same causes that the governmental agency found it necessary to produce the oil and hold the oil during the year in which it is produced, he may find it necessary to hold it into the next year. For the same reason that oil produced by such agencies is not subject to taxation by the State in any manner in the year in which it is produced, such oil should not be subject to taxation for any subsequent year while in the hands of the same agency in its original form and prior to sale.

Crude oil or petroleum in its natural state can be put to very little, if any, beneficial use. It must first be processed or refined. The purpose of a non-integrated producer of oil, such as petitioner, is to sell the crude product. Until he sells his production, he has received no benefit from his business. He cannot put the crude oil to any use beneficial to himself. The integrated producer may refine and process his own production, and convert it into products which may be put to beneficial use by himself or others. Transferring the oil from the natural reservoir below ground to an artificial one above ground is not the complete accomplishment of the business of producing oil. It is but an incident. Until his share of the oil is sold, or it is processed and refined, the object of a lessee of land for oil

and gas mining purposes is not accomplished. Storage of the oil produced until it can be sold or otherwise beneficially used, whether it be for a day, a month, or a year or more, is an essential function of the business of producing oil, as much so as drilling the wells and pumping or flowing them. It is obvious that a tax laid upon the lessee of restricted Indian lands with respect to his ownership of his share of the oil produced prior to sale and in its original form, whether assessed a day, a month, or a year or more after its production, is as much a burden on him and interference with the governmental function, as a tax upon the right to drill wells or produce oil, or a tax laid upon such oil at the moment of production. A tax laid upon such oil so produced with respect to its ownership on the first day of January of any subsequent year, is as much within the principles of the decided cases, as a tax laid thereon at the moment of production or at any time within the year it is produced.

While the amount of the tax is immaterial (*Johnson* v. *State of Maryland, supra*), it may be noted that the rate of the tax here complained of is higher than the rate of the tax that was condemned by this Court in *Howard* v. *Oil Companies, supra,* and *Large Oil Co.* v. *Howard, supra.* In those cases the rate of tax was 3 per cent of the value of the oil produced ($3.00 per $100.00), while the rate of tax here sought to be imposed is 34.05 mills on the dollar of valuation, or $3.40 per $100.00 (R. 20).

Any doubt as to the invalidity of this tax should be removed by the decision of this Court in *Jaybird Mining Co. v. Weir,* 271 U. S. 609, which applies the principles of the previous decisions herein discussed to an ad valorem tax on the production in the year after that in which it was produced.

Point Eight

The decision in Jaybird Mining Company v. Weir cannot be distinguished in principle and is decisive of this case.

The questions of law involved in that case and in this case are identical. The essential facts are the same. There are some differences, but not sufficient to afford ground for distinguishing the cases on principle.

In that case the court was dealing with the rights of a lessee under:

(a) A lease on restricted Indian land. An identical situation exists in this case.

(b) The lease was one approved by the Secretary of the Interior under rules and regulations prescribed by him under authority of an Act of Congress, just as in this case.

(c) The object of the lease was to secure the development and use of the restricted Indian land and to secure a percentage of the gross proceeds of the ores mined therefrom for the benefit of an Indian ward of the Government. The object of the leases in this case was to secure the de-

velopment of restricted Indian lands and to secure a percentage of the oil (or its value) produced therefrom for the benefit of the Indian wards of the Government.

(d) The lease was being operated under the supervision of the Interior Department, and the royalty was being accounted for to the Secretary or his agent. Such is provided in the leases involved in this case. (See Lease, R. p. 21, Secs. 2, 4, 5, and 8.)

(e) No question was involved as to the power of the State to impose the gross production tax on the lessee's share of the ores in the tax year in which the same was mined. No such question is involved in this case as to the lessee's share of the oil in the year in which it was produced.

(g) No question was involved in that case as to the power of the State to tax the share or interest of the Indian ward in the ore. No question is involved in this case as to the power of the State to tax the Indian's interest in the oil produced. That share of the oil was acquired by the petitioner under the terms of the lease, and the same was returned, assessed, and taxes thereon paid without protest.

(h) The question involved in that case was the validity of the tax assessed against such lessee, with respect to the ores in mass, on hand on January first of the year subsequent to that in which the same was mined, under that provision of Section 9814, C. O. S. 1921, as follows:

"Oil in storage, asphalt and ores bearing minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property, within the taxing district in which such property is situated at the time."

The question involved in this case is the validity of the tax, assessed against such lessee with respect to his share of crude oil in the condition in which it was produced and on hand on January first of a year subsequent to that in which it was produced, under the same provision of the statute.

In the former case the court held: (a) that the lessee was an agency or instrumentality of the Federal Government; and (b) that the tax in question was invalid as an attempt to tax an instrumentality used by the United States in fulfilling its duty to the Indians.

In this case the Supreme Court of the State, while not denying that petitioner was an agency or instrumentality of the Federal Government, did not follow the decision of this Court as to the invalidity of the tax, but made an effort to distinguish it because of certain differences in the facts adverted to in opinion, viz:

(1) The ores in the former case were stored on the premises from which the same were mined, while in these cases the oil had been removed from the premises and stored in tanks located on other lands.

(2) The interest of the Indian in the ores had not been segregated in the former case, while in this case settlement had been made for the interest of the Indian in the oil produced.

(3) In this case the oil claimed to be exempt had been commingled in the storage tanks with other oil which it was admitted was subject to taxation.

In the opinion, the State Supreme Court said (R. 41):

> "If the oil sought to be taxed in this case had been stored on the premises from which it was produced and if it had not been separated from the portion belonging to the lessor, under the rule stated in the Jaybird case, it would be exempt from ad valorem taxation."

Do these differences afford grounds for distinguishing the cases in principle? We think not.

(1) *Storage elsewhere than on the leased premises is immaterial.* In the Jaybird Mining case the lessee had provided, at his own expense, wooden bins on the leased premises for storing the ores in mass. It must be assumed that reasons sufficient in the judgment of the lessee made it necessary that the ores be stored. In the case at bar, if the wells were to be produced and the leased lands protected against drainage, thereby protecting the interest of the Indian royalty owner, it was necessary that the oil be stored above ground until it could be utilized by sale or otherwise. Storage of crude oil requires special facilities, such as steel tanks adapted to that use and specially located with refer-

ence to minimizing fire and other hazards. Storage in emergency cases must be made wherever it can be secured. Can it make any difference in principle that it so happened that tanks for storage purposes could be secured and utilized although not located on the leased premises? The burden of providing storage is on the lessee and obviously it would be less burdensome to store the oil on the leased premises if storage were available than to incur the expense of moving the production a distance from the wells and there providing the necessary facilities for storage. The burden for providing storage and transportation to storage is not the burden here complained about. That is a burden properly imposed by the Government upon and assumed by the lessee under the implied, if not the express, covenants of the lease for the protection of the Indian wards of the Government. The burden here complained about is the burden of the tax sought to be imposed by the State, not by the Federal Government nor with its consent. It can make no difference whether the tax be imposed on the oil stored on the lease or on the same oil stored off the lease. In either case it is the same tax and the same burden which hinders and impedes the function of the lessee as a federal agent or instrumentality.

For these reasons the place of storage would not seem important in the application of the principle. If the State can tax oil in one place, it can tax it in another, and the burden attaches in the one case as well as in the other. The

function of a lessee as a federal agency does not end with the drilling of wells and the production of the oil. It is also his duty to save it. It can only be saved by being placed in tanks. A federal agency is as much entitled to protection against any interference or burden imposed by the State in performing the function of storing the oil as he is in performing the function of drilling wells or producing oil. So far as the principle involved is concerned, it is immaterial whether the function of storing the oil is performed upon the leased premises or the adjacent premises or elsewhere.

(2) *It is immaterial that the Indians had no interest in the oil sought to be taxed, and that settlement had been made for their royalty or equitable interests.*

The fact that the lessee had not settled with the Indian lessor for royalties on the ores involved in the Jaybird Mining case at the time of the assessment has no apparent significance so far as the principle involved is concerned. The ores sought to be taxed belonged to the Mining Company, and the State was seeking to tax the ores as property of the Mining Company, and not property of the restricted Indian. In this case the petitioner claims immunity from state taxation on the share of the crude oil (7/8 of the whole) which it acquired at the time of production under the terms of the lease. The petitioner is not claiming immunity on that share of the oil (1/8 of the whole) to which

the Indians were entitled at the time it was produced, and to which it acquired title by settlement with the Superintendent of the Five Civilized Tribes. It has paid the tax assessed on that share so acquired without protest.

Although the oil produced may be commingled in the tanks, the pipe line, or sold as a unit, without a physical separation of the lessor's (landowner's) or royalty interest, from the producer's (lessee's) or working interest, the statute, Sec. 9814, C. O. S. 1921 (Appendix I), which provides for the taxation of crude oil, treats each interest separately. The producer (lessee) is required to report the amount of oil produced, its actual cash value, the amount of the royalty payable thereon, to whom payable, and, if there is a claim of exemption of the royalty interest from taxation, the facts upon which it is based.

The producer (lessee), is only required to pay the tax on his proportion of the production. No tax is imposed on the lessee for the royalty portion of the oil. The law provides (C. O. S. 1921, Section 9814, Appendix I) the lessee

> "Shall at the same time pay to the State Auditor a tax equal to * * * 3 per cent of the gross value of the production of petroleum or other crude or mineral oil * * * less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest * * *."

Hence the question as to whether the owner of the royalty interest in the production had paid the tax, or was liable therefor, could have no bearing on the liability of the

lessee for a tax on lessee's interest in the production. Therefore the question of payment of royalty on the segregation of the royalty portion or interest from the lessee's interest in the production could have no bearing on the liability or non-liability of lessee for taxes on his portion of the production, and cannot be material in weighing the question as to whether the tax sought to be imposed on the lessee in this case is a burden on and hinders the lessee as a government instrumentality.

It may very well be that the lessee's interest is taxable, while the lessor's is not, or *vice versa.* Compare *Carpenter* v. *Shaw, supra.* Whether the lessor's royalty interest is taxable may depend entirely upon whether the land from which the oil is produced is taxable, and whether it is produced by a federal agency or instrumentality is immaterial. Whether the petitioner's interest is taxable depends entirely on whether it is a federal agency or instrumentality, and the effect of the tax upon it as such, and is not governed by whether the land from which it is produced or the royalty interest, is taxable.

In the Howard cases the Court was dealing with the tax on the lessee's share alone, and in the Gillespie case with the lessee's income from his share of the production alone. In no one of these cases was the status of the royalty interest involved in the decision, nor was the decision in any wise turned upon what disposition had or had not been made of that interest.

The portion of the statute providing for taxation of oil for years subsequent to that in which it is produced, has been heretofore quoted. Other statutes, Section 9627, C. O. S. 1921 (Appendix II) requires that such oil be taxed to the proper owner thereof.

The sole question here is whether the petitioner's share of the oil produced to which it became entitled under the terms of the lease may be taxed by the State. Whether the royalty or equitable interest originally belonging to the Indians has been segregated, or settlement made therefor, and whether that interest is now taxable, can have no bearing on the question of whether the petitioner is a federal agency or instrumentality, and a tax upon his share of the production may not be imposed by the State for that reason.

(3) *The fact that the oil in question has been commingled in common storage with other oil is immaterial.*

The statute provides for a tax on personal property to be assessed against the owner thereof on January 1 of each year. It is apparent that fungible goods of different owners in common storage affords no insurmountable obstacle to an assessment against each for the value of his part. All that is necessary is to determine what part belongs to each. If the part of one owner is exempt from taxation, no assessment can be made against him, but that does not render the part belonging to other owners exempt from taxation. For the same reason, if part of the share of the same owner

is exempt from taxation and the remainder is not, the assessment is made against the owner on the taxable part, and the non-taxable part is not taken into consideration. In determining the value of the capital and surplus of a corporation for ad valorem taxation, the value of the part invested in exempt or non-taxable securities or property is not taken into consideration. *In re Oklahoma National Life Insurance Co.*, 68 Okla. 219. See *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra.* In assessing a tank of oil under Section 9627 (Appendix II), containing oil of two or more owners, the assessor simply determines the amount belonging to each, and makes the assessment against each owner for the value of his share. In the event the tank contains both taxable and non-taxable oil, he determines the amount that is taxable and makes his assessment accordingly.

The doctrine of Confusion of Goods does not extend to goods of the same nature and value, although not capable of an actual separation by identifying each particle, if the portion of each owner is known, and a division can be made of equal proportionate value, as in the case of a mixture of corn, coffee, tea, wine or other article of the same kind and quality. In such cases neither owner loses his property, but each is entitled to his aliquot part of the whole. *Dalton* v. *Bilbo*, 126 Okla. 139, 258 Pac. 274; *Hentz* v. *The Idaho*, 93 U. S. (3 Otto) 575; *Great Southern Gas Co.* v. *Logan Nat. Gas Co.*, 83 C. C. A. 574 (Cer. den. 207 U. S.

590); *Vest* v. *Bond Bros.*, 223 Ala. 552, 137 So. 392; *Ramsey* v. *Rodenburg*, 72 Colo. 567, 212 Pac. 820; *Somers* v. *Kane*, 168 Minn 420, 210 N. W. 287; *St. Paul Broom Co.* v. *Kemp*, 125 Wis 138, 103 N. W. 259.

The fact, therefore, that the oil was stored with other oil did not destroy any right of the owner therein.

In handling, transporting and storing crude oil of two or more owners, it is necessarily mixed in the pipe lines and tanks, yet the courts recognize the rights of the several owners to their respective aliquot parts. The lessee's share (working interest) and the land owner's (royalty interest) share, under a lease, are both produced from the same well, through the same pipes, into the same tanks, and usually delivered to the same pipe line, at the same time, but under a lease which reserves to the lessor a share of the product, the interest of each is regarded as his separate property, and may be the subject of conversion. *Clark* v. *Slick Oil Co.*, 88 Okla. 55, 211 Pac. 497; *W. T. Waggoner Estate* v. *Wichita County* (5th C. C. A.), 3 Fed. (2d) 962; *Elliott Jones & Co.* v. *Waurika Oil Association*, 253 S. W. 601; *Sothern Oil Co.* v. *Waggoner* (5th C. C. A.) 276 Fed. 487; *Smith* v. *Linden* (W. Va.). 71 S. E. 167.

All that was incumbent on petitioners by way of identification of the oil claimed to be immune from state taxation was to show the amount of his share of the oil in the storage tanks that was produced from the restricted Indian lands. This it was able to do to the satisfaction of the

representatives of the State, and the amount was stipulated (R. 20).

Goods moving through a State in interstate commerce cannot be taxed by that State, while goods moving in a State in intrastate commerce may be so taxed. All oil transported by pipe line carrier is mixed and commingled in course of transportation. The fact that a quantity of oil in course of transportation by pipe line may be in part moving in intrastate commerce and part in interstate commerce in a given State on the date as of which property is assessed for ad valorem taxation would not subject the entire amount to assessment and taxation, but at least the aliquot part shown to be moving in interstate commerce could not be assessed and taxed. *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265; *Peoples Natural Gas Co.* v. *Public Service Commission of Pennsylvania,* 270 U. S. 550. In the case last cited, this Court said:

> "As respects the Pennsylvania gas, we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. *But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So, for all practical purposes the two are separable, and neither affects the character of the business as to the other. Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265, 66 L. ed. 227, 42 Sup. Ct. Rep. 101; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277, 281, 66 L. ed. 234, 239, 42 Sup. Ct.

Rep. 105. And see *Hallanan* v. *Eureka Pipe Line Co.*, 261 U. S. 393, 67 L. ed. 715, 43 Sup. Ct. Rep. 414; *Hallanan* v. *United Fuel Gas Co.*, 261 U. S. 398, 67 L. ed. 718, 43 Sup. Ct. Rep. 416."

CONCLUSION

There are decisions which hold that the immunity of agencies and instrumentalities of the Federal Government does not extend to the property privately owned by the agency although employed in the execution of the agency. Under that rule the privately owned machinery and equipment of the lessee used in drilling wells and producing and saving oil and gas would be subject to taxation. But it is not the form of the tax, whether a property tax or an occupation tax, which necessarily controls. The rule that the property of the government instrumentalities is not immune from state taxation will not be mechanically applied, regardless of the consequences to the operations of the Government. Since it appears both on reason and authority that the tax here involved, though in form an ad valorem tax upon property, does burden the petitioner as an agency or instrumentality of the Federal Government, and retards and impedes the performance of the governmental function of fully protecting the Indian wards in securing the development and operation of their lands for oil and gas through

the instrumentality of leases for a share of the product, the tax must be held invalid.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX

Relevant Statutes

I.

Section 9814, Compiled Oklahoma Statutes, 1921 (Session Laws Oklahoma, 1916, p. 102. Sec. 12434, Oklahoma Statutes, 1931):

"Every person, firm, association or corporation engaged in the mining or production within this State of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D. 1916, and of each quarter-annual period thereafter expiring respectively, on the last day of June, September, December and March of each year, file with the State Auditor, a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The

owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this Act.

"The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States and the amount of the tax on the royalty interest shall be a lien on such interest.

"The State Auditor shall have power to require any such person, firm, corporation or association engaged in mining or the production of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil and natural gas or owner of any royalty interest therein to furnish any additional information by him deemed to be necessary for the purpose of correctly computing the amount of said tax and to examine the books, records and files of such person, firm, corporation or association and shall have power to examine witnesses, and if any witness shall fail or refuse to appear and testify at the summons or requests of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear and testify or to produce any book, record or file to the district court of this State having jurisdiction of the party, and said court shall thereupon issue a summons to said party to appear and give such evidence and produce such books, records and files as may be required and upon failing to do so, the offending party shall be punished as provided by law in cases of contempt.

"The State Auditor shall have power to ascertain and determine whether or not any return herein required is a true and correct return of the gross products and of the value thereof of such person, firm, corporation or association engaged in the mining or production of asphalt and ores bearing minerals afore-

said and of petroleum or other crude oil or mineral oil and of natural gas, and if any person, firm, corporation or association has made an untrue or incorrect return of the gross production or value thereof, as hereinbefore required, or has failed or refused to make such return, the said State Auditor shall ascertain the correct amount of either, and compute said tax.

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and *oil in storage*, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

"The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes

herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas, or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of, in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said board to said Court; provided, that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered."

II.

Section 9627, Compiled Oklahoma Statutes, 1921 (Sec. 14, Ch. XXXVIII, Session Laws Oklahoma, 1909. Sec. 7334, Revised Laws of Oklahoma, 1910. Sec. 12606, Oklahoma Statutes, 1931):

"It shall be the duty of the township assessor of any township in which tanks or tank farms for storage of crude petroleum are located to assess as other property is assessed, to the proper owners at the fair cash value, as hereinbefore defined, any and all such tanks and the contents thereof; together with all boilers, tools, pipes, pumps, fixtures and appurtenances of every kind used by or for the purpose of producing, pumping, distributing or storing any crude petroleum or natural gas; and for the purpose of enabling him to make a correct assessment thereof, he shall go upon

and have access to every plant, pump station, receiving station, tank farm or office where information regarding any such property may be obtained."

III.

Sections 9660, 9662, Compiled Oklahoma Statutes, 1921 (Session Laws, Oklahoma, 1910-1911, p. 331. Secs. 7730, 7733, Oklahoma Statutes. 1931):

Sec. 9660: "The office of county assessor is hereby created. There shall be appointed by the Governor, before the first day of January, 1912, a county assessor in and for each county of this State, whose duties and compensation shall be as hereinafter provided, and whose term of office shall commence on the first Monday in January, 1912, and continue until the first Monday in January, 1913, or until his successor is elected and qualified. A county assessor shall be elected at the general election in 1912, and every two years thereafter, and shall assume the duties of his office the first Monday in January following his election.

Sec. 9662: "The county assessor provided for in this act shall have the same powers and perform the same duties in assessing property and making the returns thereof, in taking the assessment, and gathering statistical information as is now provided by law, not in conflict with this act, for township assessors." * * *

IV.

Section 9574, Compiled Oklahoma Statutes, 1921 (Sec. 12317, Oklahoma Statutes, 1931):

"All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation. * * *"

Section 12581, Oklahoma Statutes, 1931 (Session Laws, 1923-1924, Ch. 29, Amending Sec. 9960, Compiled Oklahoma Statutes, 1921):

"All taxable property shall be listed and assessed each year at its fair cash value, estimated at the price it would bring at a fair voluntary sale, in the name of the owners thereof on the first day of January of each year, as soon as practicable on or after the fifteenth day of January, including all property owned on the first day of January of that year * * *."

V.

Act May 27, 1908 (35 U. S. Stat. L. [Pt. 1] 312):

"Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in

part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled, 'An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes,' approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three) are hereby continued in force in the State of Oklahoma.

"Sec. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one: but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided further, That the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

VI.

Act May 10, 1928 (Chap. 517, 45 Stat. L. 495), as amended by Act February 14, 1931 (Ch. 179, 46 Stat. L.):

"Section 3. That all minerals produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as

those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the taxes so assessed against the royalty interests of the respective Indian owners in such oil, gas. and other mineral production:

"Provided, That nothing in this Act shall be construed to impose or provide for double taxation and, in those cases where the machinery or equipment used in producing oil or other minerals on restricted Indian land are subject to the ad valorem tax of the State of Oklahoma for the fiscal year ending June 30, 1931, gross production tax which is in lieu thereof shall not be imposed prior to July, 1931."

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No. 356

In the Supreme Court of the United States

October Term, 1932.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, A CORPORATION, *Appellant,*

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, *Appellee.*

On Appeal from the Supreme Court of the State of Oklahoma

Jurisdictional Statement of Appellee.

W. L. COFFEY,
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HUGH WEBSTER,
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IN THE SUPREME COURT OF THE UNITED STATES.

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No. 356

INDIAN TERRITORY ILLUMINATING OIL COMPANY, A CORPORATION, *Appellant,*

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, *Appellee.*

On Appeal from the Supreme Court of the State of Oklahoma

JURISDICTIONAL STATEMENT OF APPELLEE.

May It Please the Court:

The appellee, in response to appellant's jurisdictional statement, respectfully represents:

The question presented is whether appellant, under the record has brought itself within the classification of a federal instrumentality, such as to raise a federal question and permit it to prosecute this appeal. We believe that under the stipulation and agreed statement of facts upon which this matter was heard and submitted, appellant is not a federal instrumentality; that there is want of a substantial federal question and that this appeal should be dismissed for want of jurisdiction.

The stipulation and agreed statement of facts (R. 16.)* recites in paragraph 9 thereof:

> "That pursuant to the terms of the Departmental lease, copy of which is attached hereto as Exhibit 'A', appellant as lessee paid or caused to be paid to the Superintendent of the Five Civilized Tribes, Muskogee, Oklahoma, for the said lessors, as royalty, the sum of 12½% of the gross proceeds of all crude oil extracted from said land, said payment being made at the time of removal of the oil. The said Indians and lessors owned no part of the oil in storage on January 1, 1929, nor will they receive any part of the proceeds of same when sold or disposed of by appellant."

It was further stipulated (R. 16..) that the oil sought to be taxed was produced from land in Seminole County which was owned by restricted Indians; that the oil was produced in 1927, commingled with oil from unrestricted land and immediately piped from the place of production to storage tanks owned by appellant in Tulsa County and there held in storage since 1927 as the property of appellant. The Supreme Court of Oklahoma in ruling upon this case, in its opinion (R. 70..) said:

> "If the oil sought to be taxed in this case had been stored on the premises from which it had been produced and if it had not been separated from the portion belonging to the lessor, under the rule stated in the *Jaybird* case, it would be exempt from ad valorem taxation. That rule is not applicable to the facts in this case which show that the portion of the oil produced, which belonged to the lessor, had been delivered to the Super-

*All references to the record are to pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Oklahoma and on file with the Clerk of this Court. The record has not yet been printed.

intendent of the Five Civilized Tribes for the benefit of the lessor and that the lessor owned no part of the oil in storage."

We believe the above statement of the Oklahoma Supreme Court properly distinguishes this case from the *Jaybird* case relied upon by appellant and that appellant is not a federal instrumentality within the purview of the constitution, treaties and laws of the United States.

The opinion in the *Jaybird* case, 271 U. S. 609, states that the company had a mining lease on the restricted land on terms which provided for the payment of royalties or a percentage of the gross proceeds derived from the sale of ores mined; that the ad valorem tax there in controversy was assessed by the county officials on the ores *en masse* before sale and that the royalties or equitable interests of the Indians had not been paid or segregated.

In the case at bar, pursuant to the terms of the Departmental lease, appellant paid the royalty on removal of the oil from the lease, assuming entire and absolute ownership of the oil for such purposes as it saw fit. It thereby removed itself from the category of a federal instrumentality and entered the realm speculator and adventurer.

This honorable court in *Group No. 1 Oil Corporation* v. *Bass*, 283 U. S. 279, 282, 283, said:

"This court has consistently held that, where property or any interest in it has completely passed from the government to the purchaser, he can claim no immunity from taxation with respect to it, merely because it was once government owned, or because the sale of it effected some government purpose. *City of New Bruns-*

wick v. *United States, supra; Forbes* v. *Gracey, supra; Tucker* v. *Ferguson, supra;* see *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 371, 32 S. Ct. 499, 56 L. ed. 801; *Choctaw, O. & G. R. R. Co.* v. *Mackey,* 256 U. S. 531, 537, 41 S. Ct. 582, 65 L. ed. 1076; *Central Pacific R. R. Co.* v. *California,* 162 U. S. 91, 125, 16 S. Ct. 766, 40 L. ed. 903; *Union Pac. Railroad Co.* v. *Peniston,* 18 Wall. 5, 35-37, 21 L. ed. 787; *Weston* v. *Charleston, supra,* page 468 of 2 Pet.

"Property which has thus passed from either the national or a state government to private ownership becomes a part of the common mass of property and subject to its common burdens. Denial to either government of the power to tax it, or income derived from it, in order to insure some remote and indirect antecedent benefit to the other, would be an encroachment on the sovereign power to tax, not justified by the implied constitutional restriction. * * *

"True, since restricted, allotted, or tribal lands of Indians are instrumentalities of the federal government, it has been held that neither leases of the lands, *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, 36 S. Ct. 453, 60 L. ed. 779, nor gross income derived from them, *Choctaw, O. & G. R. R. Co.* v. *Harrison,* 235 U. S. 292, 35 S. Ct. 27, 59 L. ed. 234; see *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503, 38 S. Ct. 426, 62 L. ed. 1239; *Large Oil Co.* v. *Howard,* 248 U. S. 549, 39 S. Ct. 183, 63 L. ed. 416; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 46 S. Ct. 592, 70 L. ed. 1112; nor net income, *Gillespie* v. *Oklahoma,* 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338, may be taxed by a state. But no case has extended such immunity to property, real or personal, or income derived from its sale, where it has passed to the buyer by a completely executed act of sale, without restriction, and no interest in it has been retained for the benefit of the Indians. Whatever may

> be the appropriate limits of the immunity, as applied in this class of cases, those limits are clearly exceeded by that asserted here."

That case is fairly analogous to the case at bar. In that case under the Texas law, title to the oil, by the lease, vested in the lessee before severance and was held to be taxable. Likewise in the case at bar, title to the oil upon removal from the lease under the provisions of the Departmental lease as well as under the stipulation and agreed statement of facts, vested absolutely in the lessee.

The decision in *Gillespie* v. *State of Oklahoma*, 257 U. S. 501, relied upon by appellant, involved the question of the validity of a claim for state income tax and is not applicable herein. This court in *Burnett* v. *Coronado Oil & Gas Co.*, 76 L. ed. 590, 591, said:

> "We are disposed to apply the doctrine of *Gillespie* v. *Oklahoma* strictly and only in circumstances closely analogous to those which it disclosed."

For the foregoing reasons we respectfully submit that appellant is not a federal instrumentality; that there is want of a substantial federal question and that this honorable court should not take jurisdiction of this appeal.

Respectfully submitted,

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Tulsa County, Oklahoma,

HUGH WEBSTER,
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INDIAN TERRITORY ILLUMINATING OIL COMPANY, A CORPORATION, *Petitioner,*

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, *Respondent.*

BRIEF OF RESPONDENT.

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INDEX.

PAGE

THE OPINION OF THE COURT BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

Point A. Petitioner ceased to function as a federal agency when it removed the oil from the lease, paid the Indian, commingled the oil with other oil, piped it to another county and there held it in storage for a period of years, presumably for a more advantageous market 9

Point B. As to persons or corporations which serve as agencies of government, and also engage on their own account in business for gain, it is well settled that immunity does not extend to their private property or to their use or enjoyment of it, but only to their operations or acts as such agencies 15

Point C. The implied immunity of one government, either national or state, from taxation by the other should not be enlarged so as to give undue advantages to persons or corporations operating for profit, at the expense of the state and without corresponding benefit to the national government 20

Point D. The bearing of this tax on government operations is too indirect and remote to be regarded as an interference with congressional power. The rule that government instrumentalities are immune from taxation will not be mechanically applied, regardless of the consequences to the operations of government 23

Point E. The tax in question is in no sense an occupation or privilege tax, nor is it an income or profits tax, but is a property tax sanctioned by this court since *McCulloch* v. *Maryland* 28

CONCLUSION 33

APPENDIX I—Stipulation and agreed statement of facts 34

APPENDIX II—Section 8, article X, of the Constitution of Oklahoma; Compiled Oklahoma Statutes, Secs. 9574, 9627, 9666, 9814, 9960 38

AUTHORITIES CITED.

	PAGES
Act of Congress of February 13, 1925, Sec. 8	2
Board of Equalization of Tulsa County v. Indian Territory Illuminating Oil Co., 13 P. (2d) 585,	2
Burnett v. Coronado Oil & Gas Co., 285 U. S. 392, 398	28
Catholic Missions v. Missoula, 200 U. S. 118	25
Choctaw O. & G. R. R. Co. v. Harrison, 235 U. S. 292	28, 29, 30
Constitution of Oklahoma, Art. X, Sec. 8	38
C. O. S. 1921, Secs. 9574, 9627, 9666, 9814, 9960	8
Dyer v. Melrose, 215 U. S. 594	22
Educational Film Corporation v. Ward, 282 U. S. 379	21
Forbes v. Gracey, 94 U. S. 762	10
Fox Film Corporation v. Doyal, 286 U. S. 123, 128	14, 30
Gillespie v. State, 259 U. S. 501	28, 29, 32
Group No. 1 Oil Corporation v. Bass, 282 U. S. 279	13, 14, 17, 26, 27
Henderson Bridge Co. v. Kentucky, 166 U. S. 150	24
Hibernia Society v. San Francisco, 200 U. S. 310	22
Indian Motocycle Co. v. United States, 283 U. S. 570	12, 24
In re Protest of Bendelari, 82 Okl. 97, 198 Pac. 606	9
In re Skelton Lead & Zinc Co., 81 Okl. 134, 197 Pac. 495	9
Jaybird Mining Co. v. Weir, 271 U. S. 609	7
Marland v. United States, 53 F. (2d) 907	32
McCulloch v. Maryland, 4 Wheat. 316, 436, 4 L. ed. 579 608	17, 19, 23, 28
McIntosh v. Aubrey, 185 U. S. 122	22
Metcalf v. Mitchell, 269 U. S 514	20, 24
N. Y. Lake Erie R. R. v. Pennsylvania, 158 U. S. 431	24
Rust Land Co. v. Jackson, 250 U. S. 71	3
Rules of the Supreme Court, Rule 38, paragraph 2	2
South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261	14
Susquehanna Power Co. v. State Tax Commission, 283 U. S. 291	11, 21
Thomas v. Gray, 169 U. S. 264	24
Thompson v. Union Pacific R. R. Co., 9 Wall. 579, 19 L. ed. 792, 798	27-28
Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 418	3
Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787, 792, 793	15, 21
Wagoner v. Evans, 170 U. S. 588	25
Weston v. Charleston, 2 Pet. 466, 7 L. ed. 481, 488	25
Western Union v. Mass, 125 U. S. 530	21
Wheeler Lumber Co. v. United States, 281 U. S. 572	24
Willcuts v. Bunn, 282 U. S. 216	24, 31, 32

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1932.

No. 356

INDIAN TERRITORY ILLUMINATING OIL COMPANY, A CORPORATION, *Petitioner,*

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, *Respondent.*

BRIEF *of* RESPONDENT.

May It Please the Court:

Petitioner has heretofore filed its brief in support of papers whereon its petition for writ of *certiorari* was allowed. Inasmuch as no brief has been filed following the order allowing the writ we assume that the brief heretofore filed will be taken as petitioner's brief at this time and herewith respectfully submit our brief in response thereto.

I.

The Opinion of the Court Below.

The opinion of the court below has not yet been officially reported. The opinion of the Supreme Court of Oklahoma is unofficially reported in *Board of Equalization of Tulsa County* v. *Indian Territory Illuminating Oil Co.*, 13 P. (2d) 585. The opinion is dated May 17, 1932 (R. 28).

II.

Jurisdiction.

Section 8 of the Act of Congress of February 13, 1925, provides in part as follows:

> "That no * * * writ of *certiorari*, intended to bring any judgment or decree before the Supreme Court for review, shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of *certiorari* to the Supreme Court of the Phillippine Islands may be granted where application therefor is made within six months; *provided*, that for good cause shown either of such periods for applying for a writ of *certiorari* may be extended not exceeding sixty days by a justice of the Supreme Court."

Paragraph 2, Rule 38, Rules of the Supreme Court, provides:

> "The petition will be deemed in time when it, the printed record, and the supporting brief, are filed with the clerk within the period prescribed by section 8 of the Act of February 13, 1925."

The Supreme Court of the United States has held that it has no power to review by *certiorari* a final judgment or

decree of either a state or a federal court after the expiration of the period fixed by statute.

—*Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418;

Rust Land Co. v. *Jackson*, 250 U. S. 71.

The date of the judgment to be reviewed is May 17, 1932 (R. 37). The transcript of the record of the Supreme Court of Oklahoma, including all the appeal papers, was lodged in the office of the clerk of this court on September 8, 1932 (R. 47), more than three months after May 17, 1932, the date of the judgment to be reviewed, and more than three months after June 7, 1932, the date petition for rehearing was denied. They were, therefore, filed out of time and the writ of *certiorari* should not be entertained.

III.

Statement of the Case.

This case, in the courts below, was submitted upon a stipulation and agreed statement of facts (R. 18 to 29), attached hereto as an appendix at page 34. This stipulation and agreed statement of facts discloses the following material facts:

1. That the four tanks in question contained on January 1, 1929, approximately 172,747 barrels of oil produced by petitioners from producing leasehold estates located in Seminole County, Oklahoma, which were:

(a) Commercial leasehold estates on which no restrictions of any nature had been imposed; and,

(b) Restricted leasehold estates.

2. That of the oil produced by petitioner and stored in the four tanks, 51,630 barrels of said oil was produced by petitioner from "restricted leasehold estates," this being the oil which petitioner seeks to be exempted from ad valorem tax.

3. That said oil was produced during the period from March 31, 1927, to June 16, 1927, and commingled and intermingled at the time and place of production with oil from the "commercial leasehold estates" in Seminole County, Oklahoma, and piped into storage tanks owned by petitioner located in Tulsa County, Oklahoma, where it has remained in storage since 1927.

4. That the taxing officials have no way of determining or knowing the oil produced from "restricted leaseholds" as distinguished from that produced from "commercial leaseholds."

5. That the oil from the "restricted leasehold estates," comprises approximately 30% of the entire amount of the oil produced and stored as determined by gauges at the wells.

6. That the tanks in which this oil was stored are not on any of the leaseholds from which any of the oil was produced but are a distance of fully 75 miles from the place of production.

7. That under the terms of the departmental lease, copy of which is attached to the stipulation as Exhibit "A" and appears in the record (R. 21), lessee paid, or caused to be paid to the Superintendent of the Five Civilized Tribes,

Muskogee, Oklahoma, for the said lessors as royalty, the sum of 12½% of the gross proceeds of all crude oil extracted from said land, said payment being made at the time of removal of the oil. That said Indians and lessors owned no part of the oil in storage on January 1, 1929, nor will they receive any part of the proceeds of same when sold or disposed of by petitioner.

8. That of the oil produced on the "commercial leasehold estates" a gross production tax had been paid by petitioner as provided by section 9814, C. O. S. 1921, but that on all oil produced from the "restricted leasehold estates" no gross production tax had been paid.

IV.

Summary of the Argument.

Point A.

Petitioner ceased to function as a federal agency when it removed the oil from the lease, paid the Indian, commingled the oil with other oil, piped it to another county and there held it in storage for a period of years, presumably for a more advantageous market.

Point B.

As to persons or corporations which serve as agencies of government, and also engage on their own account in business for gain, it is well settled that immunity does not extend to their private property or to their use or enjoyment of it, but only to their operations or acts as such agencies.

Point C.

The implied immunity of one government, either national or state, from taxation by the other should not be enlarged so as to give undue advantages to persons or corporations operating for profit, at the expense of the state and without corresponding benefit to the national government.

Point D.

The bearing of this tax on government operations is too indirect and remote to be regarded as an interference with congressional power. The rule that government instrumentalities are immune from taxation will not be mechanically applied, regardless of the consequences to the operations of government.

Point E.

The tax in question is in no sense an occupation or privilege tax, nor is it an income or profits tax, but is a property tax sanctioned by this court since *McCulloch v. Maryland.*

ARGUMENT.

Petitioner relies on the case of *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609. Examination of that case discloses that it involves an entirely different state of facts than exist here. In the *Jaybird* case the ore sought to be taxed was mined from land owned by a restricted Indian and at the time it was attempted to be assessed for taxation such ore was in bins at the mine and on the property where it was produced, a veritable part of the mining operations. It was assessed on the ores in mass and the royalties or equitable interests of the Indians had not been paid or segregated. This is so for the court says:

> "The amount sued for is an ad valorem tax assessed by the county officials under Sec. 9814, Compiled Statutes (Okla.) of 1921, on lead and zinc ores mined by the company in 1920, and which were in its bins on the land January 1, 1921. This tax is in addition to a gross production tax paid to the state auditor. It was assessed on the ores in mass; and the royalties or equitable interests of the Indians had not been paid or segregated."

And also:

> "In this case the lease was made to secure the development of the lands and obtain for the benefit of the restricted Indian owners a percentage of the gross proceeds of the ores to be mined. The ad valorem tax here in controversy was assessed on the ores in mass at the mine before sale, and that was an attempt to tax an agency of the federal government within the principle of the cases cited."

This language used by the Supreme Court certainly means something and cannot be facetiously disregarded. We interpret it to mean that the interests of the lessor and the lessee were so inseparable that a tax of the one would burden the other. It is for that reason that the *Jaybird* case is distinguishable from the case at bar.

In the case at bar the oil belongs exclusively under the stipulated facts to the lessee. The Indian's portion had been paid at the time of removal of the oil. It is in lessee's possession, stored in its own tanks approximately 75 miles from where it was produced, with the interests of the lessor entirely segregated therefrom.

Also it is to be noted that the tax sought to be imposed in the *Jaybird* case was that of January first following the year in which the ore was produced, with the gross production tax paid, while in the case at bar the tax is that of two years subsequent to the year of production with the gross production tax not paid. Can it be said that this alleged exemption exists where the gross production tax has not been paid, and continues beyond the year of production and indefinitely year after year until the stored oil is sold?

Both the constitution of the state, section 8, article X, and the statutes, sections 9574, 9627, 9666, 9814, and 9960, C. O. S. 1921 (see appendix, p. 38) contemplate that all property in the state shall bear its just proportion of taxes, and that is what we contend here. We seek to require a visible, tangible and very valuable class of property, found with the great mass of property of the state and from which has been excluded the Indian's portion, to bear its just burden

of ad valorem taxation along with other property of the state of the same class.

The Oklahoma Supreme Court in *In re Skelton Lead & Zinc Co.*, 81 Okl. 134, 197 Pac. 495, held:

> "A state has inherent power to raise necessary revenue for state government; hence it has power to impose an ad valorem tax upon all property which must look to the state for protection and which the state is obliged to protect."

See also *In re Protest of Bendelari*, 82 Okl. 97, 198 Pac. 606.

Point A.

Petitioner ceased to function as a federal agency when it removed the oil from the lease, paid the Indian, commingled the oil with other oil, piped it to another county and there held it in storage for a period of years, presumably for a more advantageous market.

It will be noted at the outset that the lease (R. 22) provides:

> "The lessee hereby agrees to pay, or cause to be paid to the Superintendent of the Five Civilized Tribes, Muskogee, Oklahoma, for the said lessors as royalty, the sum of 12½ per cent of the gross proceeds of all crude oil extracted from said land, *such payment to be made at the time of the sale or removal of the oil* * * *." (Italics ours.)

Clearly that provision contemplates that any transactions that are had for the Indian shall be present transactions; that is to say that the Indian and the government has an interest or claim in the oil until it is removed from the lease,

but that upon removal the lessee shall make satisfactory settlement with the Indian, and this was done.

We assume that it may be said that as long as the oil remains upon the lease in an unsegregated state the government and the lessee are in a sense mining partners; that it is a joint adventure and that the government has a lien, or claim, or title in the oil, which of course, may not be taxed. And as inferred in the *Jaybird* case, the interests of the lessor and lessee are so inseparable that they may not be taxed because that would be in the nature of a tax on operations. But quite a different proposition prevails in the case at bar, where the Indian has been paid, the oil removed from the land, and in which the government no longer has any lien, claim or title. This, we submit, is in a sense covered in the case of *Forbes* v. *Gracey*, 94 U. S. 762, wherein the court said:

> "The moment mineral or ore becomes detached from the soil of the public lands in which it is imbedded, it becomes personal property, the ownership of which is in the man whose labor, capital, and skill has discovered and developed the mine and extracted the ore.
>
> "It is then free from any lien, claim or title of the United States and is rightfully subject to taxation by the state as any other personal property is."

We think it may be safely assumed that the Indian Territory Illuminating Oil Company had this oil in storage along with some 120,000 barrels of other oil from unrestricted leases, holding it for more advantageous prices. Practically two years had elapsed since this oil was first stored, and

it is worthy of note, although not a matter of record in the case at bar, that there is now pending in the District Court of Tulsa County, three additional cases involving taxes for the years 1930, 1931 and 1932, on this same oil still in storage. That being the case, to what extent will this honorable court go in permitting property of this character to remain immune from state taxation? Will this honorable court, as it were, subsidize this company in its marketing transactions? No such privilege is accorded to other oil companies whose property is located in the State of Oklahoma, and who must pay an ad valorem tax upon their stored oil. And there is no evidence in the record that this company, in storing its oil for a period of years, was acting as a governmental agency.

This court, in the case of *Susquehanna Power Co.* v. *State Tax Commission,* 283 U. S. 291, says:

> "With that end in view the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage. The distinction was pointed out by Chief Justice MARSHALL in *McCulloch* v. *Maryland,* 4 Wheat. 316, 436, 4 L. ed. 579, 608, and in *Osborn* v. *Bank of United States,* 9 Wheat. 738, 867, 6 L. ed. 204, 234. See *Union P. R. Co.* v. *Peniston,* 18 Wall. 5, 34-37, 21 L. ed. 787, 792-794. It has been followed without departure, and property so owned and used has uniformly been held to be subject to state taxation. *Thompson* v. *Union P. R. Co.,* 9 Wall. 579, 19 L. ed. 792; *Central P. R. Co.* v. *California,* 162 U. S. 91, 40 L. ed. 903, 16 S. Ct. 706; *Union P. R. Co.* v. *Pen-*

iston (18 Wall. 5, 34-37, 21 L. ed. 787, 792-794), *supra; Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore,* 195 U. S. 375, 49 L. ed. 242, 25 S. Ct. 50, *supra; Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 56 L. ed. 801, 32 Sup. Ct. Rep. 499; *Ackerlind* v. *United States,* 240 U. S. 531, 60 L. ed. 783, 36 S. Ct. 438; *Alward* v. *Johnson,* 282 U. S. 509, 51 S. Ct. 273; *Choctaw O. & G. R. Co.* v. *Mackey,* 256 U. S. 531, 65 L. ed. 1076, 41 S. Ct. 582; *Group No. 1 Oil Corp.* v. *Bass,* 282 U. S. 279, 51 S. Ct. 432, decided this day."

And to the same effect the case of *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, wherein the court says that:

> " * * * as to persons or corporations which serve as agencies of government, national or state, and also have private property or engaged on their own account in business for gain, it is well settled that the principle does not extend to their private property or private business, but only to their operations or acts as such agencies."

This, we think, is fundamental, that when a federal agency ceases to function in that capacity and its operations are designed to promote its own private advantages, its immunity from taxation ceases. We respectfully submit that that is the situation in the case at bar. The I. T. I. O. Company had ceased to function as a federal agency. It had entered the realm of speculator and adventurer, a situation in which the federal government was no longer concerned, and to which the government will not lend the helping hand of tax immunity. The lease contract does not contemplate that the lessee shall speculate in the markets at the expense

of the Indian. Then why should the government play longer with the lessee and say to it, You pay the Indian, remove the oil where you please, hold it as long as you please, and we will protect you against state taxation?

The case of *Group No. 1 Oil Corporation* v. *Bass,* 282 U. S. 279, bears out this same contention, wherein the court says:

> "Property sold or otherwise disposed of by the government, either state or national, in order to raise revenue for government purposes, is in a broad sense a government instrumentality, with respect to which neither the property itself before sale, nor its sale by one government, may be taxed by the other. *But it does not follow that the same property in the hands of the buyer, or his use or enjoyment of it, or the income he derives from it, is also tax immune. New Brunswick* v. *United States,* 276 U. S. 547, 72 L. ed. 693, 48 S. Ct. 374; *Forbes* v. *Gracey,* 94 U. S. 762, 24 L. ed. 313, 14 Mor. Min. Rep. 183; *Tucker* v. *Ferguson,* 22 Wall. 527, 22 L. ed. 805. See *Weston* v. *Charleston,* 2 Pet. 449, 469, 7 L. ed. 481, 488." (Italics ours.)

It is worthy of note at this point that the I. T. I. O. Co., as quickly as possible paid off the Indian and eliminated him from further consideration. In other words the Indian was paid on the basis of the present market, for the oil company, no doubt, had its own ambitions with respect to future markets and did not care to be hampered in its operations with any interest that the Indian or the government might have in the oil. This, we think, is fairly indicative of the speculative purposes that the oil company had in mind. There can be no escape from the fact that the I. T.

I. O. Co., elected to store the oil for a better market to its own enrichment and enjoyment.

This same case, *Group No. 1 Oil Corporation* v. *Bass,* refers to what appears to be a controlling case, *i. e., South Carolina* v. *United States,* 199 U. S. 437, 50 L. ed. 261, wherein it was held that a state that engages in a private business may be taxed by the federal government for the reason that the thing in which the state was engaged was not governmental. So in the case at bar, the storing of oil for a period of years is a private business and is not governmental and is not done as an agency of the government.

In the recent case of *Fox Film Corporation* v. *Doyal,* 286 U. S. 123, 128, the court says:

> "The principle of immunity from state taxation of instrumentalities of the federal government, and of the corresponding immunity of state instrumentalities from federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland,* 4 Wheat. 316, 436, 4 L. ed. 579, 608), and the immunity does not extend '*to anything lying outside or beyond governmental functions and their exertions.*' *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 576, 576, 579, 75 L. ed. 1277, 1281, 1282, 51 S. Ct. 601. Where the immunity exists, it is absolute, resting upon an 'entire absence of power' (*Johnson* v. *Maryland,* 254 U. S. 51, 55, 56, 65 L. ed. 126, 128, 129, 41 S. Ct. 16), but it does not exist '*where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.*' *Willcuts* v. *Bunn,* 282 U. S. 216, 225, 75 L. ed. 304, 306, 71 A. L. R. 1260, 51 S. Ct. 125."

"* * * The disposition by the government of public lands, in order to advance the general interest by promoting settlement, illustrates the principle and its limitation. The property of the United States is not subject to state taxation * * * but the property of individual owners, although derived from the United States under its public land laws, may be taxed. The power to tax exists as soon as the ownership is changed. * * * Though the legal title remains in the government, if the proceedings *have reached the point where nothing more remains to be done* by the entryman *and the government no longer has any beneficial interest in the land and does not exclude the entryman from the use of it, he is regarded as the beneficial owner and the land is subject to taxation.*"

"* * * It is thus apparent that the mere fact that a property right is created by statute to fulfill a governmental purpose does not make it non-taxable when it is held in private ownership and exercised for private advantage. See *Susquehanna Power Co.* v. *State Tax Commission*, 283 U. S. 291, 297, 75 L. ed. 1042, 1047, 51 S. Ct. 434." (Italics ours.)

Point B.

This court has laid down the principle numerous times that no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such agent.

As stated in *Union Pacific R. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787, 792:

"A contrary doctrine would greatly embarrass the states in the collection of their necessary revenue without any corresponding advantage to the United States."

And, further:

"Nothing, we think, in the past decisions of this court is inconsistent with the opinions we now hold. *McCulloch* v. *Md.*, and *Osborn* v. *Bk.*, 9 Wheat. 738, are much relied upon by the appellants, but an examination of what was decided in those cases will reveal that they are in full harmony with the doctrine that the property of an agent of the general government may be subjected to state taxation. In the former of those cases the tax held unconstitutional was laid upon the notes of the bank. The institution was prohibited from issuing notes at all except upon stamped paper furnished by the state, and to be paid for on delivery, the stamp upon each note being proportioned in its denomination. The tax, therefore, was not upon any property of the bank, but upon one of its operations; in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision. It does not extend, said the chief justice, to a tax paid by the real property of the bank in common with the other real property of the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with the other property of the same description throughout the state. But this is a tax upon the operations of the bank and is, consequently, a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional. Here is a clear distinction made between a tax upon the property of a govern-

ment agent and a tax upon the operations of the agent acting for the government."

And the court in this same case makes the very appropriate observation:

> "But when the question is, as in the present case, whether the taxation of property is taxation of means, instruments or agencies by which the United States carriers on its powers, it is impossible to see how it can be pertinent to inquire whence the property originated or from whom its present owners obtained it."

So in the case at bar it does not seem to be pertinent at this stage to inquire whence the property originated. It has become a part of the mass of property of the state. It is enjoying the protection of the laws of the state and the police powers of the state. May it continue indefinitely to be immune from state taxation because, perchance, it originated some two years back from a restricted Indian lease? We respectfully submit that such a contention is a complete departure from the rule announced by Chief Justice MARSHALL in *McCulloch* v. *Maryland,* and which has ever remained the guiding principle in these cases.

This honorable court in *Group No. 1 Oil Corporation* v. *Bass,* 283 U. S. 279, 282, 283, said:

> "This court has consistently held that, where property or any interest in it has completely passed from the government to the purchaser, he can claim no immunity from taxation with respect to it, merely because it was once government owned, or because the sale of it effected some government purpose. *New Brunswick* v. *United States,* 276 U. S. 547, 72 L. ed.

693, 48 S. Ct. 371; *Forbes* v. *Gracey,* 94 U. S. 762, 24 L. ed. 313; *Tucker* v. *Ferguson,* 22 Wall. 527, 22 L. ed. 805; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 371, 32 S. Ct. 499, 56 L. ed. 801; *Choctaw, O. & G. R. R. Co.* v. *Mackey,* 256 U. S. 531, 537, 41 S. Ct. 582, 35 L. ed. 1076; *Central Pacific R. R. Co.* v. *California,* 162 U. S. 91, 125, 16 S. Ct. 766, 40 L. ed. 903; *Union Pacific Railroad Co.* v. *Peniston,* 18 Wall. 5, 35-37, 21 L. ed. 787; *Weston* v. *Charleston, supra,* page 468 of 2 Pet.

"Property which has thus passed from either the national or a state government to private ownership becomes a part of the common mass of property and subject to its common burdens. Denial to either government of the power to tax it, or income derived from it, in order to insure some remote and indirect antecedent benefit to the other, would be an encroachment on the sovereign power to tax, not justified by the implied constitutional restriction. * * *

"True, since restricted, allotted or tribal lands of Indians are instrumentalities of the federal government, it has been held that neither leases of the lands, *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, 36 S. Ct. 453, 60 L. ed. 779, nor gross income derived from them, *Choctaw, O. & G. R. R. Co.* v. *Harrison,* 235 U. S. 292, 35 S. Ct. 27, 59 L. ed. 234; see *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503, 38 S. Ct. 426, 62 L. ed. 1239; *Large Oil Co.* v. *Howard,* 248 U. S. 549, 39 S. Ct. 183, 63 L. ed. 416; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 46 S. Ct. 592, 70 L. ed. 1112; nor net income, *Gillespie* v. *Oklahoma,* 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338, may be taxed by a state. *But no case has extended such immunity to property, real or personal, or income derived from its sale, where it has passed to the buyer by a completely executed act of sale, without restriction, and no interest in it has been retained for the benefit of the Indians.* Whatever may be the

appropriate limits of the immunity, as implied in this class of cases, these limits are clearly exceeded by that asserted here." (Italics ours.)

That case is fairly analogous to the case at bar. In that case under the Texas law, title to the oil, by the lease, vested in the lessee before severance and was held to be taxable. Likewise, in the case at bar, title to the oil upon removal from the lease under the provisions of the departmental lease as well as under the stipulation and agreed statement of facts, vested absolutely in the lessee. We are unable to see any distinction.

Point C.

We believe we are safe in saying that it is the policy of this court not to extend or further enlarge the implied immunity of one government, either national or state, from taxation by the other.

Chief Justice MARSHALL, in *McCulloch* v. *Maryland, supra,* in no undecided terms laid down that principle when he said:

"If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which *leaves the pou r of taxing the people and property of a state unimpaired; which leaves to a state the command of its resources,* and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which

are given for the purpose of carrying those powers into execution." (Italics ours.)

With that rule as a guide this court has always protected the sovereign right of the state in its taxation of property within the state. In the case of *Metcalf* v. *Mitchell*, 269 U. S. 514, this court held that the earnings of consulting engineers engaged in advising states and municipal corporations were not exempt from income tax, and after discussing the principles underlying immunity from taxation, the court said:

> "When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. *Thompson* v. *Pacific Railroad*, 9 Wall. 579, 19 L. ed. 792; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787; *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375, 25 S. Ct. 50, 49 L. ed. 242; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 371, 32 S. Ct. 499, 56 L. ed. 801; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 36 S. Ct. 298, 60 L. ed. 664; *Choctaw O. & G. R. R. Co.* v. *Mackey*, 256 U. S. 531, 41 S. Ct. 582, 65 L. ed. 1076.
>
> "As cases arise lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the rea-

son upon which the rule rests, and which must be the guiding principle to control its operation."

And in *Susquehanna Power Company* v. *State Tax Commission,* 283 U. S. 291, the court said:

"The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one, or the appropriate exercise of its functions by the other."

And in *Western Union* v. *Mass,* 125 U. S. 530, the court said:

"Agencies of the federal government are only exempt from state taxation so far as such taxation may interfere with or impair the agency in performing the functions by which they serve the government."

And in the case of *Educational Film Corporation* v. *Ward,* 282 U. S. 379, the court said:

"The rule that government instrumentalities are immune from taxation will not be mechanically applied, regardless of the consequences to the operations of government."

And, as stated in *Union P. R. Co.* v. *Peniston,* 18 Wall. 5, 21 L. ed. 787, 793:

"It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, *but upon the effect of the tax;* that is, upon the question *whether the tax does in truth deprive them of power to serve the government as they were intended to serve*

> *it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect.* It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers."

In *Dyer* v. *Melrose,* 215 U. S. 594, it was held that the salary of a naval officer on deposit in a bank is not exempt from state taxation; likewise pension money, *McIntosh* v. *Aubrey,* 185 U. S. 122; likewise United States checks or orders issued for interest accrued upon registered bonds of the United States, where intended for immediate payment. *Hibernia Society* v. *San Francisco,* 200 U. S. 310. The court in *McIntosh* v. *Aubrey, supra,* says:

> "It is not that the pension money shall be exempt from attachment in all its situations and transmutations. It is only to be exempt in one situation, to-wit, when 'due or to become due.' From that situation the pension money of plaintiff in error has departed."

These cases, we submit, are fairly analogous to the case at bar in that they hold in principle that as long as there is a government function involved immunity from taxation will prevail, but that once that function ceases the privilege is withdrawn.

Certainly the sovereignty of the national government ends and the sovereignty of the state begins when an oil company ceases to operate as a producer and enters the realm of speculation. Here is an oil company claiming to be a federal instrumentality that has paid off its Indian lessor according to the terms of the lease, piped its oil from

the place of production to another county, holding it in storage, presumably speculating on the market and while seeking to hide behind the skirts of the national government, takes advantage of all the rights and benefits of the state law, civil and criminal, state police power, insurance laws and what not, year after year, and unwilling to share its burden of taxation. We say the principles as enunciated by Chief Justice MARSHALL in the *McCulloch* case do apply, and that the sovereign power of the state extends to the taxation of this property.

There is a clear distinction between the *means* employed by the government and the *property* of agents of the government in performance of contracts with the government. In *McCulloch* v. *Maryland, supra,* the court took pains to distinguish between the right of the State of Maryland to tax the *operation* of the National Bank and the paper issued by it and the tangible *property* of the bank, when it said that the state could tax the *property* held by the bank in common with all other property of the state although it might be burdensome, and that this can in no sense be considered an interference with the operation of an instrumentality of the government.

Point D.

Following out the principles enunciated above, the court has held in numerous instances that immunity will not be extended to those cases in which the bearing on governmental operations is too remote to be regarded as an interference with congressional power.

The court in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, in referring to *Metcalf* v. *Mitchell,* 269 U. S. 514; *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572; and *Willcuts* v. *Bunn,* 282 U. S. 216, stated that these cases "are all distinguishable, for the taxes there in question were not laid on transactions involving an exertion of governmental functions and their bearing on governmental operations was so indirect as to place them outside the principle which is applicable here."

And in the case of *Thomas* v. *Gay,* 169 U. S. 264, the court said:

> "But it is urged that the Indians are directly and vitally interested in the property sought to be taxed, and that their rights of property and person are seriously affected by the legislation complained of; that the money contracted to be paid for the privilege of grazing is paid to the Indians as a tribe, and is used and expended by them for their own purposes, and that if, by reason of taxation, the conditions existing at the time the leases were executed were changed, or could be changed by the Legislature of Oklahoma, at its pleasure, the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions.
>
> "But it is obvious that the tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privilege of the Indians."

And the court in that case refers to *N. Y. Lake Erie R. R.* v. *Pennsylvania,* 158 U. S. 431, and *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150, where it was held that a tax on tolls was too indirect and remote to be regarded as

a tax or burden on interstate commerce, although it was in those cases contended that the tax might be supposed to increase the tolls, and, therefore, be a burden on interstate commerce. The court then says:

> "The unlimited power of Congress to deal with the Indians * * * may be conceded, but it is not perceived that local taxation by a state or territory, of property of others than Indians would be an interference with Congressional power.
>
> "The taxes in question here were not imposed on the business of grazing or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress."

See also *Wagoner* v. *Evans*, 170 U. S. 588, and *Catholic Missions* v. *Missoula*, 200 U. S. 118.

But it will be argued by petitioner that a tax imposed upon this oil in storage at any time prior to sale will affect the value of leases of this character and to that extent be a burden on the government in its dealings with the Indians. But Chief Justice MARSHALL, in the case of *Weston* v. *Charleston*, 2 Pet. 466, 7 L. ed. 481, 488, disposed of that argument, wherein he said:

> "It is admitted by counsel for defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight than if urged against its application * * * to lands sold by the United States. * * * When lands are sold, no connection remains between the purchaser and

> the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burden. * * * Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may be assumed is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans; it is no impediment to the power of borrowing, that the money when repaid, loses its exemption from taxation. But a tax upon debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold."

Paraphrasing the above and applying it to the case at bar we might say that the connection between the government and its instrumentality has been dissolved; that it is no burden on the Indian wards, and it is no impediment on the operations of the lease, that the oil, after the Indian's portion has been paid for, and the oil removed and commingled with other oil, and held in storage at the whim of the owner, loses its exemption from taxation, but a tax on the unsegregated oil on the lease, or a tax on the gross production, or a tax on the income from the lease stands on different principles from a tax on oil which is held in storage for a period of years and has entered the marts of trade.

And in the recent case of *Group No. 1 Oil Corporation* v. *Bass,* 283 U. S. 279, the court says:

> "Theoretically, any tax imposed on the buyer with respect to the purchased property may have some effect on the price, and thus remotely and indirectly affect the selling government. We may assume that if the property is subject to tax after sale, the governmental

> seller will generally receive a less favorable price than if it were known in advance that the property in the hands of late owners, or even the buyer alone, could not be taxed."

So in the case at bar, if it were known in advance that immunity from taxation was to be extended to oil from restricted lands wherever shipped and however long stored, such inducement might conceivably affect the market value of such leases. Likewise, if the immunity were extended into the manufactured product many of these oil companies that are engaged in refining and manfacturing, as well as in production and marketing, would be attracted to such bounties. And, if immunity extend to oil removed from the lease and piped into other counties of the state and there held in storage, may it not also extend to oil piped to other states, or across the continent, or to the gulf or the seaboard?

But the court in *Group No. 1 Oil Corporation, supra,* says:

> "But the remote and indirect effects upon the one government of such nondiscriminatory tax by the other have never been considered adequate grounds for thus aiding one at the expense of the taxing power of the other."

If the immunity against state taxation be extended and enlarged in the case at bar, it is fair to presume that the same privileges will be demanded by state instrumentalities against federal taxation. As was stated by Chief Justice Chase in *Thompson* v. *Union Pacific R. R. Co.,* 9 Wall. 579, 19 L. ed. 792, 798:

"We perceive no limits to the principle of exemption which the complainants seek to establish."

And,

"The nature of the claims to exemptions which would be set up, is well illustrated by that which is advanced by the complainants in the case before us."

Point E.

The tax in question is in no sense an occupation or privilege tax. Nor is it an income or profits tax, but is a property tax sanctioned by this court since *McCulloch* v. *Maryland.*

Petitioner relies upon the case of *Gillespie* v. *State,* 259 U. S. 501, but that is a case in which the state sought to impose a tax on the net income derived by a lessee of restricted Indian lands. It has no application to a recurring tax such as the ad valorem tax which is applied each year the property remains on hand. Under the law there is some reason for exempting the income derived from a restricted source, but there is neither reason nor equity in exempting the stored oil of ad valorem tax year after year and indefinitely after all the elements of income have been eliminated from it.

The court in *Burnett* v. *Coronado Oil & Gas Co.,* 285 U. S. 392, 398, said:

"We are disposed to apply the doctrine of *Gillespie* v. *Oklahoma* strictly and only in circumstances closely analogous to those which it disclosed."

Petitioner relies on *Choctaw O. & G. R. R. Co.* v. *Harrison,* 235 U. S. 292, wherein the railroad company as les-

see of certain coal mines sought to be relieved of a state gross revenue tax because it was operating as a government agency through which the United States was performing its duty to the Indians. In that case the court held that the gross revenue tax is an occupation or privilege tax which cannot be exacted from a federal instrumentality acting under congressional authority, but that is certainly not analogous to the case at bar.

In the course of the discussion in the *Choctaw R. R.* case, the court makes the statement:

> "But it is insisted that the statute, rightly understood, prescribes only an ad valorem imposition on the personal property owned by appellant —the coal at the pit's mouth—*which is permissible, according to many opinions of this court. Thompson* v. *Union P. R. Co.*, 9 Wall. 579, 19 L. ed. 792; *Union P. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787; *Central P. R. Co.* v. *California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; *Thomas* v. *Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. 340."

Thus recognizing the authority of the state to tax property of a governmental agency on an ad valorem basis.

In the case of *Gillespie* v. *State, supra,* the same principle was laid down by the court in passing on the right of Oklahoma to tax net income, when the court took the precaution to say:

> "*Whether this property could be taxed in any other form or not,* it cannot be reached as profits or income from leases as those here."

The court further says in the case of *Choctaw O. & G. R. R. Co.* v. *Harrison,* with respect to the gross production tax:

> "It is unnecessary to consider the power of the State of Oklahoma to treat coal dug from mines operated by the appellant as other personality and to subject them to a uniform ad valorem tax for it seems to us clear that the Acts of 1908 provided for no such imposition. Its very language imposes a 'gross revenue tax which shall be in addition to the taxes levied and collected upon an ad valorem basis,' * * *. The requirement is not on account of property owned on a given day as is the general custom where ad valorem taxes are provided for, and as the Oklahoma laws require; but the manifest purpose is to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes. * * * A tax upon a merchant's, manufacturer's or miner's gross sales is not the same thing as one on his stock treated as property."

The gross production tax then is in the nature of an income or operations tax. But it is admitted by the stipulation that this tax was not paid. In refusing to pay the gross production tax petitioner elected to adopt that means of availing itself of its alleged exemption of income or operations tax for the year of production and we respectfully submit that it may not each recurring year continue to claim exemption on the theory of income.

In *Fox Film Corporation* v. *Doyal,* 286 U. S. 123, 128, the court said:

> "After the copyright has been granted the government has no interest in any action under it save the

general one that its laws shall be obeyed. Operations of the owner in multiplying copies, in sales, in performances or exhibitions, or in licensing others for such purposes, are manifestly not the operations of the government. A tax upon the gains derived from such operations is not a tax upon the exertion of any governmental function."

So in the case at bar, operations of the owner in storing oil beyond the year of production for more advantageous markets are not operations of government, and a tax on such oil is not a tax upon the exertion of any governmental function.

Willcuts v. *Bunn,* 282 U. S. 216, was a case in which the court upheld a federal income tax on profits realized from the sale of municipal bonds. The argument was there made that the tax was illegal because it was a direct tax on income derived from municipal securities, governmental in character. That is virtually the argument of counsel in the case at bar (brief, p. 28, *et seq.),* it being argued that, "If the income derived from the sale of the oil is immune, the oil from which the income is derived must necessarily be immune"—that immunity of one implies immunity of the other. But the court held otherwise in *Willcuts* v. *Bunn, supra.*

The court said:

"It is urged, however, that a federal tax on the profits of sales of such securities should be deemed, as a practical matter, to lay such a burden on the exercise of the state's borrowing power as to make it necessary to deny to the federal government the constitutional

> authority to impose the tax. No facts as to actual consequences are brought to our attention, either by the record or argument, showing that the inclusion in the federal tax of profits on sales of state and municipal bonds casts any appreciable burden on the state's borrowing power. We are left to the inadequate guidance of judicial notice."

That being the rule as applied to federal taxation of state instrumentalities is it not equally applicable to state taxation of alleged federal instrumentalities? Immunity of income does not mechanically and arbitrarily carry with it immunity of the oil irrespective of how long stored and irrespective of whether the tax casts any appreciable burden on the government.

In *Marland* v. *United States,* 53 F. (2d) 907, the Court of Claims, on the authority of *Willcuts* v. *Bunn,* upheld a federal tax on profits derived from the sale of oil and gas leases of state (Oklahoma) owned school lands, holding that the *Gillespie* case was not analogous.

And in the case at bar, we say it is one thing to tax property which, although derived from a non-taxable source, has become an indistinguishable part of the taxpayer's general property and quite a different thing to tax a person on account of his receipts of an income from such source. The former casts no direct or measurable burden upon the exempted lease and its operation because the income has been separated therefrom and no longer has any connection therewith, while the latter, it is held, directly burdens the lease and its operation.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the decision of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

H. L. Anderson,
County Attorney of Tulsa County, Oklahoma;

Hugh Webster,
Tulsa, Oklahoma,
Counsel for Respondent.

APPENDIX 1.

In District Court of Tulsa County.

(Title omitted.)

Stipulation and Agreed Statement of Facts.

Filed Nov. 26, 1929.

Comes now the Indian Territory Illuminating Oil Company as appellant, by its attorneys, Fred M. Carter and C. E. Wilhite, and the Board of Equalization of Tulsa County, Oklahoma, as appellee, by the County Attorney of said county; and the said appellee reserving the right at the time of trial to move the dismissal of this appeal, and to demur to appellant's complaint, hereby stipulate and agree that if the court overrules appellee's motion to dismiss and its demurrer to appellant's complaint, the following (fol. 31) statement contains and shall constitute the statement of facts in the above entitled matter, and that the court may enter judgment accordingly the same as if such facts hereinafter recited had appeared from the evidence and testimony adduced in open court in due and regular manner upon the trial of said cause, the parties hereto reserving the right to except to the rulings, orders and judgment of the court:

1. That the Indian Territory Illuminating Oil Company is a corporation organized under the laws of the State of Delaware, existing and doing business under the laws of the State of Oklahoma, and engaged in the production and marketing of crude oil, and that for the purposes of this hearing the said Indian Territory Illuminating Oil Company, a corporation, shall be designated as appellant, and the Board of Equalization of Tulsa County, Oklahoma, designated as appellee.

2. That appellant, on the 8th day of April, 1929, in due time, prepared and filed with the County Assessor of

Tulsa County, Oklahoma, its assessment list or schedule, wherein was incorporated, among other items of property, the following, to-wit: 4 55,000-bbl. steel storage tanks; 51,630 bbls. crude oil, located in School District No. 22, Red Fork Township, Tulsa County, Oklahoma, and notation made in and on said return and as a part thereof, that appellant deemed said property exempt from taxation, and claimed exemption from taxation on said property in said county, by any ad valorem taxing agency within the State of Oklahoma.

3. That the claim of appellant relative to exemption from taxation of the storage tanks and crude oil above designated was by the County Assessor of Tulsa County, Oklahoma, denied and said assessor did, on the 8th day of April, 1929, add said property to the assessment list of property belonging to this appellant, and assessed the value of said property in the following sums, to-wit: 4 55,000-bbl. steel (fol. 32) storage tanks, $22,000.00; 51,630 bbls. crude oil, $51,081.10.

4. That on the 5th day of June, 1929, appellant appeared before the Board of Equalization of Tulsa County, Oklahoma, with the intent and for the purpose of having said property above described stricken from the assessment list of property belonging to appellant; that on said day said board heard and considered the evidence adduced by appellant and argument of counsel in support thereof, and did, upon consideration thereof, deny the claim of appellant, and sustained the action of the County Assessor of Tulsa County, Oklahoma, in placing said property on the assessment list of said appellant.

5. That appellant gave notice of appeal from the action and decision of the Board of Equalization of Tulsa County, Oklahoma, and that the County Assessor of Tulsa County, Oklahoma, as secretary of said board, pursuant to said notice of appeal, has certified the proceedings had and done before said board to this court.

6. That the storage tanks mentioned above and complained of herein, and on account of which appearance was had before the Board of Equalization and appeal therefrom lodged in this court, contained on January 1, 1929, approximately 172,747 bbls. of oil produced by appellant from producing leasehold estates located in Seminole County, Oklahoma, which were *(1)* commercial leasehold estates, which is to say, fee simple, or those on which no restrictions of any nature have been, or are now, imposed, or if imposed have been removed by the proper authority, and *(2)* restricted leasehold estates, which is to say, leases or lands owned by restricted Indians on which lands such restrictions have been, and are now imposed by Acts of Congress. But that except as advised by appellant, the assessor and the Board of Equalization of Tulsa County, Oklahoma, had no way of knowing from where or from what leases said oil was produced. That on the oil produced from the "commercial leasehold estates" a gross production tax has been paid by appellant, as provided by Sec. 9814, C. O. S. 1921; that on all oil produced from the "restricted leasehold estates" no gross production tax has been paid, this being the oil which appellant here seeks to be exempted from ad valorem tax in Tulsa County, Oklahoma; that the four storage tanks and the 51,630 bbls. of (fol. 33) crude oil above mentioned and involved herein were assessed for the year 1929 and subjected to a mill rate levy of 34.05 mills on the dollar valuation for state, county, school district and township taxes, but that no ad valorem tax has been paid thereon.

7. That of the oil produced by appellant and stored in the tanks above described, 51,630 bbls. of said oil was produced by appellant from lands located in Seminole County, Oklahoma, owned by Indians whose restrictions against alienation have never been removed, copy of the lease under which appellant operated and produced the oil herein involved, and of which lease appellant was assignee, is here-

to attached, marked "Exhibit A," hereby referred to and made a part hereof. But that except as advised by appellant, the assessor and Board of Equalization of Tulsa County, Oklahoma, has no way of knowing what amount of said oil in storage, if any, was produced by appellant from restricted leasehold estates. That said oil was produced during the period from March 31, 1927, to June 16, 1927, and commingled and intermingled at the time and place of production with oil from the "commercial leasehold estates" in Seminole County, Oklahoma, and immediately piped into storage tanks located in Tulsa County, Oklahoma, where it has remained in storage since 1927. That the oil from the restricted leasehold estate comprised approximately 30% of the entire amount of oil produced as determined by gauges at the wells.

8. That the steel storage tanks above mentioned are located in Tulsa County, Oklahoma, and became the property of appellant on the 14th day of March, 1927, and were acquired for the purpose of storing oil produced by it and such tanks are now, and were on January 1, 1929, owned by appellant. These tanks are not on any of the leaseholds from which any of the oil was produced, nor is it contended that they are on "restricted leasehold estates."

9. That pursuant to the terms of the departmental lease, copy of which is attached hereto as Exhibit "A," appellant as lessee paid or caused to be paid to the Superintendent of the Five Civilized Tribes, Muskogee, Oklahoma, for the said lessors, as royalty, the sum of 12½% of the gross proceeds of all crude oil extracted from said land, said (fol. 34) payment being made at the time of removal of the oil. That said Indians and lessors owned no part of the oil in storage on January 1, 1929, nor will they receive any part of the proceeds of same when sold or disposed of by appellant.

(Signatures omitted.)

(Exhibit "A," copy of lease, omitted.)

APPENDIX II.

Section 8, article X, of the Constitution of Oklahoma:

"All property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale, and any officer, or other person authorized to assess values, or subjects, for taxation, who shall commit any wilful error in the performance of his duty, shall be deemed guilty of malfeasance, and upon conviction thereof shall forfeit his office and be otherwise punished as may be provided by law."

Compiled Oklahoma Statutes:

Section 9574. "All property in this state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation. * * *"

Section 9627. "It shall be the duty of the township assessor of any township in which tanks or tank farms for storage of crude petroleum are located to assess as other property is assessed, to the proper owners of the fair cash value, as hereinbefore defined, any and all such tanks and the contents thereof. * * *"

Section 9666. "The county assessor shall on the 15th day of January of each year proceed to take a list of all taxable property in the county, and assess the value thereof as of January 1st. * * * "

Section 9814. "Oil in storage, asphalt and ores bearing minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property, within the taxing district in which such property is situated at the time."

Section 9960. "All taxable property shall be listed and assessed each year at its fair cash value, estimated at the price it would bring at a fair voluntary sale, in the name of the owner thereof on the first day of January of each year. * * *"

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 357

INDIAN TERRITORY ILLUMINATING OIL COMPANY, PETITIONER,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, OKLAHOMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1932

CERTIORARI GRANTED DECEMBER 12, 1932

(37,054)

(37,054)

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INDEX

	Original	Print
Proceedings in supreme court of Oklahoma	1	1
Citation and service (omitted in printing)	1	
Petition for appeal	3	1
Assignments of error and prayer for reversal	9	5
Order allowing appeal	13	8
Bond on appeal (omitted in printing)	15	
Præcipe for transcript of record	17	9
Petition in error	20	10
Case-made from district court of Payne County	23	12
Caption	23	12
Decision of Board of County Commissioners	26	13
Notice of appeal from Board of County Commissioners	27	14
Complaint before Board of County Commissioners	28	14
Affidavit of E. B. Emanhiser	36	20
Notice of appeal from Board of County Commissioners	39	23
Bond on appeal (omitted in printing)	41	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1932

	Original	Print
Motion to dismiss	47	24
Demurrer	49	24
Order overruling motion to dismiss and demurrer	51	25
Stipulation re certain oil in storage	54	26
Appellee's Exhibit "A"—Letter from county assessor and assessment lists	55	27
Stipulation and agreement as to facts	63	32
Stenographer's certificate (omitted in printing)	66	
Journal entry of judgment	68	34
Motion for new trial	72	36
Order overruling motion for new trial	74	37
Resolution authorizing appeal	77	38
Statement re transcript	79	39
Certificate of counsel	80	40
Service of case-made	81	40
Clerk's certificate (omitted in printing)	82	
Waiver of amendments to case-made	83	41
Waiver of notice, etc	84	41
Notice of settlement of case-made	85	42
Order settling case-made	86	42
Clerk's certificate (omitted in printing)	87	
Judgment	89	43
Opinion, Kornegay, J	90	44
Order staying mandate (omitted in printing)	100	
Clerk's certificate (omitted in printing)	101	
Statement of points to be relied upon and designation of parts of record to be printed	102	53
Order allowing certiorari		57

[fols. a & 1 & 2] Citation, in usual form, showing service on Ernest F. Jenkins, filed August 24, 1932, omitted in printing.

[fol. 3] [Title endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

INDIAN TERRITORY ILLUMINATING OIL COMPANY, Appellant (and Defendant in Error Below),

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, STATE OF OKLAHOMA, Appellee (and Plaintiff in Error Below)

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA TO THE SUPREME COURT OF THE UNITED STATES—Filed Aug. 12, 1932

Comes now the Indian Territory Illuminating Oil Company, a corporation, defendant in error in the Supreme Court of the State of Oklahoma in the above entitled cause, which cause bears the number 20,878 in the said Supreme Court of the State of Oklahoma, and respectfully shows by this petition and the assignment of errors filed herewith, that the records, proceedings, decision and judgment of the Supreme Court of the State of Oklahoma, the same being the highest court of the State of Oklahoma in which a decision could be had in the suit, and the decision and judgment therein being final, manifest error has occurred greatly to the damage of this petitioner whereby petitioner feels aggrieved.

That as appears in the records and proceedings in this cause the petitioner herein in preparing and filing with the County Assessor of Payne County its corrected assessment list or schedule of property located in Payne County, State of Oklahoma, claimed as property exempt from taxation [fol. 4] for the year 1928, by any ad valorem taxing agency of and within the State of Oklahoma, 383,307 barrels of crude oil. The said County Assessor failed and refused to accept said claim of exemption and the said oil was added to and included in the assessment roll as property located in said Payne County subject to ad valorem taxation for

the year 1928, and a tax of $7,805.72 was levied against said crude oil for said year. As provided by the statutes of the State of Oklahoma, the petitioner paid the first half of said tax under protest and thereafter duly filed in the office of the County Clerk of Payne County, Oklahoma, its complaint wherein the petitioner prayed that the Board of County Commissioners of Payne County, State of Oklahoma, plaintiff in error in the Supreme Court of the State of Oklahoma in this cause, hereinafter referred to as plaintiff in error, issue its certificate of error cancelling, setting aside and holding for naught the tax levy on the crude oil as aforesaid and further, that it order a refund to the petitioner of so much of the said tax on said oil as had been paid. After a hearing as provided by the laws of the State of Oklahoma, the said plaintiff in error denied the said complaint of this petitioner and refused the relief therein prayed for whereupon the petitioner in accordance with the laws of the State of Oklahoma, duly appealed to the District Court of Payne County, State of Oklahoma, wherein a judgment was rendered in favor of this petitioner and wherein it was held that the said 383,307 barrels of crude oil were exempt from ad valorem taxation for the year 1928, and wherein it was ordered and adjudged that the said plaintiff in error order a refund to this petitioner in the amount of $7,805.72, that being the amount of the tax levied on said cru*ed* oil which had been at the time of the rendition of said judgment paid by the petitioner under protest. From such judgment the plaintiff in error, as further provided by the laws of the State of Oklahoma, appealed to the Supreme Court of the State of Oklahoma. By the final decision of the Supreme Court of the State of Oklahoma it was held that the said District Court of Payne County, State of Oklahoma, erred in holding the said oil exempt from ad valorem taxation and the said judgment of the said district Court was reversed with direction to the said District Court of Payne County, State [fol. 5] of Oklahoma, to revoke its order directing the said plaintiff in error to strike this property from the assessment roll, and requiring the said plaintiff in error to order a refund of the said taxes paid by this petitioner under protest.

The final decision of the Supreme Court of the State of Oklahoma was made, rendered and entered on the 17th

day of May, 1932. No petition for rehearing was filed in the said Supreme Court of the State of Oklahoma in said cause.

As also appears from the records and proceedings in this cause the claim and contention that the said crude oil was exempt from and not subject to ad valorem taxation for the year 1928, by the State of Oklahoma or any political subdivision thereof, which claim and contention was made and urged throughout the entire proceedings above described, was based upon the following facts: The said crude oil was produced by the petitioner under and pursuant to the terms of a mining lease held by the petitioner on lands located in Seminole County, State of Oklahoma, and owned by Seminole Allottees, members of the Seminole tribe of Indians, as their individual allotments and restrictions against alienation of the said land imposed by Acts of Congress had not been removed. The said lease so held by the petitioner was executed by the said allottees on their said allotments and was approved by the Secretary of the Interior pursuant to the authority of an Act of Congress approved May 27, 1908 (35 Stat. at L. 312). The said oil so produced by the petitioner had not been disposed of by the petitioners from the time of production thereof until and throughout the entire tax period in question but was owned and held in storage in its original state throughout and during the entire tax period in question by the petitioner as lessee under said lease.

As further appears from the records and proceedings in this cause there was drawn in question the validity of certain statutes of the State of Oklahoma and authority exercised thereunder on the ground of their being repugnant to the Constitution, treaties, and laws of the United States and the final decision in this cause by the Supreme [fol. 6] Court of the State of Oklahoma was in favor of their validity, the said statutes of the State of Oklahoma being Section 9574 and succeeding sections of Chapter 84 Compiled Oklahoma Statutes 1921, particularly Sections 9814, 9627 and 9614, which provide for the assessment, levy and collection by the State of Oklahoma and the political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma during any given tax year including crude petroleum produced from the allotment of a restricted Seminole Indian in Seminole

County, Oklahoma, by a lessee under a lease executed by such restricted allottee and duly approved by the Secretary of the Interior, and while the oil so produced by said lessee under said lease is still owned and held in storage in its original state and not disposed of by said lessee.

And as further appears in the records and proceedings in this cause there was drawn in question the validity of certain statutes of and authority exercised under the United States and the final decision of the Supreme Court of the State of Oklahoma in this cause was against their validity; and likewise in said cause as appears from the records and proceedings therein rights, privileges and immunities were specially set up and claimed by this petitioner under the Constitution of the United States, a Treaty of the United States with the Seminole Nation of Indians, and certain Statutes of the United States and the final decision of the Supreme Court of the State of Oklahoma in this cause is against and denies such rights, privileges and immunities. The said Statutes of the United States above referred to are as follows: 30 Stat. at L. 567 (the Act ratifying the agreement between the Dawes Commission and the Seminole Nation of Indians which, among other things, provided for the allotments to members of the Seminole Nation of Indians); 34 Stat. at L. 137, 144, 35 Stat. at L. 312, 45 Stat. at L. 495 (imposing restrictions upon the alienation of lands allotted to the Seminole allottees and providing for the leasing thereof with the approval of the Secretary of the Interior); and 34 Stat. at L. 267 (the Enabling Act which provides that nothing in the [fol. 7] Constitution of the State of Oklahoma shall be construed to limit or impair the rights of persons or property pertaining to the Indians of the Territory of Oklahoma and of the Indian Territory or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if the said Act had not been passed).

Petitioner further represents that the said decision and judgment of the Supreme Court of the State of Oklahoma was erroneous in *in* holding and deciding that the crude oil above described was subject to ad valorem taxation for the year 1928 by the State of Oklahoma and its political

subdivisions, and in reversing the judgment of the said District Court of Payne County, Oklahoma, and that the said decision and judgment of the Supreme Court of the State of Oklahoma is contrary to and in violation of the Treaty and Statutes of the United States hereinbefore referred to and the Constitution of the United States.

Petitioner, by reason of the errors above indicated and more fully set out in the assignment of errors filed herewith desires to avail itself of the law and practice in such cases made and provided by appeal to the Supreme Court of the United States.

Wherefore petitioner prays for the allowance of an appeal from the Supreme Court of the State of Oklahoma to the Supreme Court of the United States and for such other and further process and proceedings as will enable this petitioner to obtain a review of the case and a correction of said errors by the Supreme Court of the United States, and also prays that an order be made fixing the amount of the security which petitioner as appellant shall give and furnish upon appeal and that upon the giving of said security all further proceedings in the Supreme Court of the State of Oklahoma be suspended and stayed until the determination of said appeal by the Supreme Court of the United States; and that a transcript of the record, proceedings and papers in this case, duly authen-
[fol. 8] ticated by the Clerk of the Supreme Court of the State of Oklahoma, may be sent to the Supreme Court of the United States.

John H. Misley, Wm. P. McGinnis, Counsel for Petitioner, Indian Territory Illuminating Oil Company.

[fol. 9] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Aug. 12, 1932

Assignment of Errors

Comes now the Indian Territory Illuminating Oil Company, the defendant in error in the Supreme Court of the

State of Oklahoma in the above cause, which cause bears the number 20,878 in the said Supreme Court of the State of Oklahoma, and the petitioner for an appeal herein, and respectfully shows that in the opinion and judgment of the Supreme Court of the State of Oklahoma in said cause, manifest errors were committed to its prejudice, which are apparent in the record and proceedings therein; that the errors committed by the Supreme Court of the State of Oklahoma in its opinion and judgment in said cause are more fully and particularly set forth as follows:

1. The Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Payne County, Oklahoma, and in holding and deciding that the said District Court of Payne County, Oklahoma, erred in holding that the property sought to be taxed in this cause was not subject to ad valorem taxation for the year 1928 by the State of Oklahoma or any political subdivision [fol. 10] thereof.

2. The Supreme Court of the State of Oklahoma erred in refusing to affirm the judgment of the District Court of Payne County, Oklahoma.

3. The Supreme Court of the State of Oklahoma erred in holding, deciding and determining that Section 9574 and succeeding sections of Chapter 84, Compiled Oklahoma Statutes 1921, particularly Sections 9814, 9627 and 9614, which provide for the assessment, levy and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma during any given tax year are valid when applied to crude petroleum produced from the allotment of a restricted Seminole Indian in Seminole County, Oklahoma, by a lessee under a lease executed by such restricted allottee and duly approved by the Secretary of the Interior and while the oil so produced is still owned and held in storage in its original state and not disposed of by said lessee and in rendering a decision in favor of the validity of said Statutes when applied to and construed to cover the property sought to be taxed in this cause, and in not holding under the facts in this cause that said Statutes as so applied are repugnant to the Constitution, Treaties and Laws of the United States.

4. The Supreme Court of the State of Oklahoma erred in holding, deciding, and determining that the acts of the County Assessor, the County Treasurer and the Board of County Commissioners of Payne County, State of Oklahoma, and the authority exercised by them and each of them under and the authority conferred and vested in them by the said Statutes of the State of Oklahoma mentioned specifically in assignment number 3 herein and above set forth, [fol. 11] and other statutes of the State of Oklahoma authorizing the assessment of an ad valorem tax on the property involved in this cause for the period in question are valid and in rendering a decision in favor of their validity and in not holding said Statutes and the authority so exercised by the officials aforesaid under said Statutes repugnant to the Constitution, Treaties and Laws of the United States.

5. The Supreme Court of the State of Oklahoma erred in sustaining the above mentioned Statutes of the State of Oklahoma, authorizing the assessment, levy and collection of ad valorem tax on the crude oil involved in this case, said crude oil being held in storage unsold and in its original state throughout and during the entire tax period in question by the petitioner herein, and said crude oil having been by the petitioner produced solely under an oil and gas lease upon restricted Seminole Lands under the control of Congress and the Secretary of the Interior.

6. The Supreme Court of the State of Oklahoma erred in its decision denying that the said crude oil produced by the petitioner is and was exempt from ad valorem taxation as claimed by said petitioner under the Constitution, Treaties and Laws of the United States.

Prayer for Reversal

For which errors the Indian Territory Illuminating Oil Company, defendant in error in the Supreme Court of the State of Oklahoma in this cause and petitioner for an appeal herein, prays that the judgment and decision of the Supreme Court of the State of Oklahoma in this cause be [fol. 12] reversed and that the said Supreme Court of the State of Oklahoma be directed to affirm the judgment of the District Court of Payne County, Oklahoma as rendered

in said cause and for such other and further relief as to the Court may seem just and proper and for its costs.

John H. Miley, Wm. P. McGinnis, Counsel for Petitioner, Indian Territory Illuminating Oil Company.

[fol. 13] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER ALLOWING APPEAL—Filed Aug. 12, 1932.

The Indian Territory Illuminating Oil Company, defendant in error in the Supreme Court of the State of Oklahoma in the above entitled cause, which cause bears the number 20,878 in the said Supreme Court of the State of Oklahoma, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the opinion and judgment made and entered in the said cause by the Supreme Court of the State of Oklahoma on the 17th day of May, 1932, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma, as prayed in said petition and as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Oklahoma shall prepare and certify a transcript of the record, proceedings, opinion and judgment in said cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in the said [fol. 14] Supreme Court of the United States within thirty days from the date hereof.

And it is further ordered that the bond on appeal be fixed in the sum of Five Hundred and no/100 ($500.00) dollars and that upon the said Indian Territory Illuminating Oil Company filing a bond in the said sum, with sufficient surety, and conditioned as required by law, the same shall operate as a supersedeas of the opinion and judgment

made and entered in the said cause, and shall suspend and stay all further proceedings in the Supreme Court of the State of Oklahoma until the final determination of said appeal by the Supreme Court of the United States.

Dated August 12, 1932.

E. F. Lester, Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

Gus Pool, Clerk Supreme Court of Oklahoma, by Reuel Haskell, Jr., Deputy. (Seal.)

[fols. 15 & 16] Bond on appeal for $500.00, approved and filed August 12, 1932, omitted in printing.

[fol. 17] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 24, 1932

To the Clerk of the Supreme Court of Oklahoma:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and you shall include in such transcript of record the following:

1. Petition for appeal from the Supreme Court of the State of Oklahoma to the Supreme Court of the United States.
2. Assignment of Errors.
3. Order Allowing Appeal to the Supreme Court of the United States and fixing the Bond.
4. Citation together with Proof of Service thereof.
5. Bond, together with Approval thereof.
6. This Præcipe.
7. Petition-in-Error, together with Case-Made attached thereto.
8. Opinion of the Supreme Court of the State of Oklahoma.

9. Judgment of the Supreme Court of the State of Oklahoma showing the entry thereof.

John H. Miley, Wm. P. McGinnis, Attorneys for Indian Territory Illuminating Oil Company, Defendant in Error and Appellant.

Service of the above and foregoing Præcipe for Transcript of Record, and receipt of a copy thereof, is acknowledged this — day of August, 1932.

—— ——, Attorney for Record for Board of County Commissioners of Payne County, State of Oklahoma.

[File endorsement omitted.]

[fols. 18 & 19] STATE OF OKLAHOMA,
Oklahoma County, ss:

Harry D. Turner, being first duly sworn, deposes and states that on the 23rd day of August, 1932, he delivered a full, true and correct copy of the Præcipe for Transcript of Record hereto attached, to Ernest F. Jenkins, County Attorney of Payne County, State of Oklahoma, and attorney of record for Board of County Commissioners of Payne County, State of Oklahoma.

Harry D. Turner.

Subscribed and sworn to before me this 24th day of August, 1932. Helen Eckert, Notary Public. My commission expires April 28, 1935. (Seal.)

[fol. 20] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION IN ERROR—Filed Nov. 8, 1929

The said Board of County Commissioners of Payne County, Oklahoma, plaintiffs in error complain of said defendant in error for that the said defendant in error, Indian Territory Illuminating Oil Company, a corporation, at the May A. D. 1929 term of the District Court of Payne

County, State of Oklahoma, and on the 2nd day of August, 1929, recovered a judgment by the consideration of said court against the said Board of County Commissioners of Payne County, in a certain action then pending in said Court, wherein the said Indian Territory Illuminating Oil Company was Plaintiff and the said Board of County Commissioners of Payne County, Oklahoma, were defendants. The original casemade, duly signed, attested and filed is hereunto attached, marked Exhibit "A" and made a part of this petition in error; and the said Board of County Commissioners avers that there is error in the said record and proceedings, in this, to-wit:

[fol. 21] 1. Said Court erred in overruling the motion of plaintiffs in error for a new trial.

2. Said court erred in not rendering judgment for plaintiffs in error on the pleadings.

3. Said court erred in overruling plaintiffs in error motion to dismiss the purported and attempted appeal of defendant in error from the order and judgment of the Board of County Commissioners.

4. Said court erred in overruling the demurrer of plaintiffs in error to the purported complaint and appeal of said defendants in error.

5. Said court erred in rendering judgment for said defendants in error.

6. Said court erred in refusing and failing to render judgment for plaintiffs in error.

Wherefore plaintiffs in error pray that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiffs in error, and against the defendant in error upon the pleadings and evidence and that the plaintiffs in error be restored to all rights that they have lost by the rendition of such judgment and for such other relief as to the Court may seem just.

Board of County Commissioners of Payne County, Oklahoma, Plaintiffs in Error, by Ernest F. Jenkins, County Attorney of Payne County, Okla., and Henry W. Hoel, Assistant County Attorney.

[fol. 22] [File endorsement omitted]

[fol. 23] IN DISTRICT COURT OF PAYNE COUNTY

No. 9597

In re Appeal of INDIAN TERRITORY ILLUMINATING OIL COMPANY from Order and Decision of the Board of County Commissioners of Payne County, Oklahoma, in the Matter of Erroneous Assessment for the Year 1928

Case-made for Appeal to the Supreme Court of the State of Oklahoma—Filed Oct. 7, 1929; filed in Supreme Court Nov. 8, 1929

Trial Judge: Hon. Charles C. Smith, District Judge

Appearances:
Fred M. Carter, C. E. Wilhite, attorneys for appellants.
Henry W. Hoel, Assistant County Attorney; Ernest F. Jenkins, County Attorney, Stillwater, Oklahoma, attorneys for appellees.

[fol. 24] And thereafter and on the 8th day of March, 1929 there is filed in the office of the Court Clerk of Payne County, Oklahoma, a transcript of the proceedings had before the Board of County Commissioners of Payne County, Oklahoma, in the matter of the erroneous assessment of the Indian Territory Illuminating Oil Company, for the year 1928, which transcript so filed as aforesaid is set out here in words, letters and figures, as follows, to-wit:

[fol. 25] (Stationery Letterhead of County Clerk Payne County, Oklahoma)

March 4, 1929.

I, County Clerk of Payne County, Oklahoma, do hereby certify that the following instruments and pleadings, to-wit:

1. Complaint,
2. Affidavit of Secretary of I. T. I. O. Co.,
3. Minutes of Meeting, Board of County Commissioners,
4. Notice of appeal,

attached hereto, are the full and complete instruments, papers and pleadings had and filed in the hearing before

the Board of County Commissioners of Payne County, Oklahoma, on March 4, 1929, at which time, said Board heard, considered and denied the complaint of said Indian Territory Illuminating Oil Company in the matter of Erroneous Assessment of said Company for the year 1928.

Dated this 4th day of March, 1929.

V. A. Doty, County Clerk, Payne County, Oklahoma. (Seal.)

[fol. 26] BEFORE BOARD OF COUNTY COMMISSIONERS, PAYNE COUNTY, OKLAHOMA

MINUTES OF MEETING

Board of County Commissioners of Payne County, Oklahoma, met in regular open session Monday, March 4th, 1929; Present, all commissioners, and the County Clerk.

The Board heard the complaint in erroneous assessment of the Indian Territory Illuminating Oil Company, heretofore filed in the office of the County Clerk of said County for hearing by said Board and being advised in the premises, and after hearing argument of counsel for said complainant and hearing the argument of the county attorney of Payne County, said Board, upon due consideration, finds: that said complaint should be denied.

It was therefore moved by Mr. J. H. Raedeker and seconded by Mr. A. C. Holbrook that said complaint should be denied. Motion carried.

It is therefore by said Board of County Commissioners ordered that the complaint of said Indian Territory Illuminating Oil Company, asking for refund of taxes paid and for certificate of error be and the same is hereby denied.

Notice of appeal to the District Court of Payne County is given by counsel for Indian Territory Illuminating Oil Company, and appeal bond in the sum of $500.00 is fixed.

Dated this 4th day of March, 1929.

Ed. T. Thatcher, Chairman; J. H. Raedeker, A. C. Holbrook, County Commissioners Payne County.

Attest:

V. A. Doty, County Clerk, Payne County. (Seal.)

[fol. 27] BEFORE BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY

In the Matter of Complaint of the INDIAN TERRITORY ILLUMINATING OIL COMPANY on Account of Erroneous Assessment for the Year 1928

NOTICE OF APPEAL

To the Honorable Board of County Commissioners of Payne County:

Whereas, on the 4th day of March, 1929, the Board of County Commissioners of Payne County, Oklahoma, in open session, entered an order of said Board, denying to the Indian Territory Illuminating Oil Company, a certificate of error in erroneous assessment, and denying to said Company a refund of a portion of taxes, which said assessment and which said taxes were and are 1928 assessment and tax.

You are therefore hereby notified that the Indian Territory Illuminating Oil Company will and does appeal from said Order of denial of said Board of County Commissioners to the District Court of Payne County, Oklahoma.

Dated this 4th day of March, 1929.

Indian Territory Illuminating Oil Company, by R. L. Gordon, Fred M. Carter, C. E. Wilhite, Its Attorneys.

Service of the foregoing notice of appeal acknowledged this 4th day of March, 1929.

Ed. T. Thatcher, Chairman Board of County Commissioners, Payne County, Oklahoma.

[fol. 28] BEFORE BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, OKLAHOMA

In the Matter of the Compalint of INDIAN TERRITORY ILLUMINATING OIL COMPANY on Account of Erroneous Assessment and Levy of Taxes for the Year 1928

COMPLAINT—Filed Feb. 28, 1929

Comes now Indian Territory Illuminating Oil Company and alleges that it is a corporation organized, existing and

doing business under and by virtue of the laws of the State of New Jersey; that it has power, right and authority to conduct business in the State of Oklahoma, and that its principal place of business therein is at Bartlesville in Washington County.

Complainant alleges that on or about the 27th day of April, 1928, it caused to be filed with the County Assessor of Payne County, Oklahoma, its certain assessment list covering personal property owned by it in said county and in Eagle and Union Townships, school Districts 91, 102 and 50, in the aggregate value of $1,153,875.00, divided as follows, to-wit:

Eagle Township, School District 91	$396,159.00
Eagle Township, School district 102	314,771.00
Union township, School district 50	443,045.00

That subsequent thereto and prior to July 6, 1928, this complainant in checking said assessment list so submitted by it to the County Assessor found errors therein due to a mistake of fact and on or about July 6, 1928, filed with the County Assessor of Payne County, Oklahoma, a corrected assessment list which was intended by Complainant to be accepted by said assessor in lieu of the assessment list [fol. 29] rendered as of date of April 27, 1928; that said second assessment list carried an aggregate valuation of $1,043,975.00 divided among the townships and school districts as follows:

Eagle Township, School District 91	$335,659.00
Eagle Township, School District 102	265,271.00
Union Township, School District 50	443,045.00

That some time subsequent to July 6, 1928, the exact date being unknown to Complainant, the County Assessor of Payne County, Oklahoma, prepared his assessment list covering property alleged to belong to this Complainant and certified the same to the County Equalization Board of said County, which list of the said County Assessor carried the aggregate valuation of $1,537,694.00 apportioned as follows, to-wit:

Eagle Township, School District 91	$610,491.00
Eagle Township, School District 102	484,158.00
Union Township, School District 50	443,045.00

That from a study of the assessment lists as hereinabove set forth the distinction and difference between them appears to be as follows:

That in the list submitted April 27, 1928, this complainant rendered for assessment and showed on said list for Eagle Township, School District 91, 11—55,000 barrel steel tanks, valuation $60,500.00; 332,336 barrels of crude oil, valuation $335,659.00; and that in the list submitted July 6, 1928, the 11—55,000 barrel steel tanks were omitted for the reason that complainant alleges the same are exempt from ad valorem taxation as will more completely hereinafter appear.

That in the assessment list of April 27, 1928, in and for Eagle Township, School District 102, this complainant rendered for assessment the following items, to-wit:

[fol. 30] 9 55,000 bbl. steel tanks, valuation $459,500.00; 267,951 bbls. crude oil, valuation $265,271.00, and that in the list rendered July 6, 1928, the item of 955,000 bbl. steel tanks of valuation of $49,500.00 was omitted for reasons hereinafter set forth.

That no change was made in any of the returns applicable to Union Township, School District No. 50; that in the list submitted by the County Assessor of Payne County and certified by him to the County Equalization Board said Assessor totally and completely ignored and failed, neglected and refused to accept the assessment list rendered him by this complain-t under date of July 6, 1928, and wholly failed, neglected and refused to accept as complete the assessment list rendered by this complainant under date of April 27, 1928, but on the contrary said assessor accepted said list filed by complainant as a partial and incomplete return and added thereto the following items, to-wit:

For Eagle township, school District 91 said assessor added an item of 212,210 bbls. of crude oil of a value of $214,332.00; that in Eagle Township, School District 102 said assessor added to the list rendered by this complainant as hereinabove set out an item of 171,097 bbls. of crude oil of a valuation of $169,386.00.

Complainant states that there was included in the aggregate assessed valuation of this complainant by the county Assessor of Payne County, in the sum of $1,537,694.00 for the year 1928, the following property located in Eagle

township, School District 91 in the total valuation of $274,-832.00 as the assessed and equalized valuation of the following property, to-wit:

[fol. 31] Item	Rate	Valuation
11 55,000 bbl. Steel tanks	.10	$60,500.00
212,210 bbls. crude oil	1.01	214,332.00

That there was included in the total tax extended on the tax rolls on the property above described and in the township and school district above set forth the sum of $4,023.27 being the amount of taxes levied against and to be paid by this Complainant on account of said assessed and equalized valuation in the sum of $274,832.00.

Complainant alleges that on the 31st day of December, 1928, it proffered to the county treasurer of Payne County, Oklahoma, its payment of the first half of the 1928 taxes, which said sum included one-half of $4,023.27, and that said county treasurer now holds said payment of complainant in his possession, although not having executed formal receipt therefor or spread the same of record, as payment for the reason that the tax rolls in and for Payne County, Oklahoma had not on said date been submitted to said treasurer; that accompanying the payment hereinbefore mentioned was a protest duly executed by complainant protesting the items hereinabove set forth.

Complainant alleges that said assessment in the sum of $274,832.00 and said tax in the sum of $4,023.27 levied by reason of the aforesaid assessment is erroneous for the reasons:

(1) That said tanks are exempt from Ad valorem taxation by virtue of Chapter 39, Session Laws 1916, of the State of Oklahoma, which provides for the payment of a gross production tax on oil produced by this complainant, and complainant states that the oil produced and run into [fol. 32] these tanks was produced by it and not purchased; that the gross production tax on said oil has been duly paid to the State Auditor of the State of Oklahoma; that said tanks were necessary and indispensable to the production and development of the producing leasehold estates from which said oil was produced.

(2) That the 212,210 bbls. of crude oil shown as one of the items above set forth is and was at the time the same was rendered and certified by the county assessor, oil produced from "restricted Indian lands" from which oil the interests of the Indians had not been disassociated; that in so producing said oil and conserving the same this complainant was acting under and by virtue of leases duly approved by the Secretary of the Interior and was functioning as a United States governmental instrumentality; and that by reason thereof said production so obtained is not subject to taxation by the state of Oklahoma under decisions of the United States Supreme Court.

That there was included in the aggregate assessed valuation of $1,537,684.00 the following described property located in Eagle Township, School District 102, of the value of $218,886.00, being the assessed and equalized valuation of the following items, to-wit:

Item	Rate	Valuation
9 55,000 bbl. steel tanks	.10	$49,500.00
171,097 bbls. crude oil	.99	169,386.00

That there was included in the total taxes extended on the tax rolls on the property above described, and in the township and school district above set forth, the sum of $6,032.28 being the amount of taxes levied against and to be paid by complainant on account of said assessed and equalized valuation of $218,886.00.

[fol. 33] Complainant alleges that on the 31st day of December, 1928, it proffered to the County Treasurer of Payne County, Oklahoma, its payment of the first half of the 1928 taxes, which said sum included one-half of $6,032.28, and that said county treasurer now holds said payment of complainant in his possession, although not having executed formal receipt therefor or spread the same of record as payment, for the reason that the tax rolls in and for Payne County, Oklahoma, had not on said date been submitted to said treasurer; that accompanying the payment hereinbefore mentioned was a protest duly executed by complainant, protesting the items hereinabove set forth.

Complainant alleges that said assessment in the sum of $218,886.00 and said tax in the sum of $6,032.28 levied by

reason of the aforesaid assessment is erroneous for the reasons:

(1) That said tanks are exempt from ad valorem taxation by virtue of Chapter 39, Session Laws 1916, of the State of Oklahoma, which provides for the payment of a gross production tax on oil produced by this complainant, and complainant states that the oil produced and run into these tanks was produced by it and not purchased; that the gross production tax on said oil has been duly paid to the state auditor of the State of Oklahoma; that said tanks were necessary and indispensable to the production and development of the producing leasehold estates from which said oil was produced.

(2) That the 171,097 bbls. of crude oil shown as one of the items above set forth is and was at the time the same was rendered and certified by the County Assessor, oil produced from "restricted Indian lands" from which oil the [fol. 34] interests of the Indians had not been disassociated; that in so producing said oil and conserving the same this complainant was acting under and by virtue of leases duly approved by the Secretary of the Interior and was functioning as a United States governmental instrumentality; and that by reason thereof said production so obtained is not subject to taxation by the state of Oklahoma under decisions of the United States Supreme Court.

As a sort of résumé complainant alleges that the aggregate valuation of $1,537,694.00 as rendered and certified by the County Assessor of Payne County, Oklahoma, is erroneous and should be by this Honorable Board set aside; that the true and correct aggregate valuation of the personal property of this complainant in the townships and school districts hereinabove enumerated should be the sum of $1,043,975.00.

Complainant further states that the total amount of taxes levied against it and appearing of record as reflected by the assessor's records in the sum of $28,154.22 are erroneous and illegal and unlawfully levied and that the true and correct amount of taxes payable by this complainant to Payne County is $18,098.67; and that this complainant is entitled to have a reduction in the amount of its taxes in the sum of $10,055.55.

Wherefore complainant prays the Honorable Board of County Commissioners of Payne County, Oklahoma,

First. That said Board of County Commissioners issue its certificate of error herein cancelling, setting aside and holding for naught the tax levy appearing of record in the sum of $28,154.22 insofar as the same exceeds the sum of $18,098.67, and that this complainant be entitled to a relief in the sum of $10,055.55, alleged erroneous tax.

[fol. 35] Second. That in the event the tax rolls have been certified to the county treasurer and said county treasurer has accepted the payment of this complainant and now holds the same pursuant to the protest filed with said treasurer, in a separate fund as provided by law, then and in that event that the Board of County Commissioners order the County Treasurer of Payne County, Oklahoma, to make a refund to this complainant in the amount $5,027.78, being the first half of the 1928 tax which complainant alleges is unlawful and excessive.

Third. That in the event said county treasurer has accepted the payment of this complainant of the first half of the 1928 tax paid by it under protest then and in that event the said Board of County Commissioners issue its certificate of error cancelling, setting aside and holding for naught the tax in the further sum of $5,027.77 being the amount of the last half of the 1928 tax (due July 15, 1928) which complainant alleges is unlawful and excessive.

Indian Territory Illuminating Oil Company. R. L. Gordon, Fred M. Carter, C. E. Wilhite, Its Attorneys.

Duly sworn to by W. M. Plake. Jurat omitted in printing.

[fol. 36] AFFIDAVIT OF E. B. EMANHISER

STATE OF OKLAHOMA,
Washington County, ss:

E. B. Emanhiser, of lawful age, being first duly sworn, on oath states: that he is the duly elected, qualified and acting secretary of Indian Territory Illuminating Oil Com-

pany, a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with power and authority to do business within the State of Oklahoma; that its principal place of business is at Bartlesville, in Washington County, Oklahoma; that as such officer, he has knowledge of the facts hereinafter stated.

That on April 27, 1928, a schedule, or list of assessment, was prepared and filed with the County Assessor of Payne County, Oklahoma, purporting to be a true, accurate and correct list of all property owned by said corporation above named, subject to taxation for the year 1928 in said Payne County; that said list was prepared by J. H. Skinner, who at that time had charge of such matters for said corporation. That subsequently, an alleged error having been discovered in the schedules, or list, as submitted of date of April 27, 1928, another and different schedule, or list, was prepared and, on July 6, 1928, filed with the County Assessor [fol. 37] of Payne County to be used in lieu of the one previously submitted; that said schedule, or list, was prepared under the supervision of Mr. Frank N. Hunt, who at that date, was in charge of such matters for said corporation.

That upon the filing of said supplemental schedule, or list of assessment on July 6, 1928, the said Frank N. Hunt presumed that said supplemental list would be accepted and used in lieu of the former schedule, or list; that subseqeunt thereto, said Frank N. Hunt severed his connection with said corporation, and that for a time, no particular person was actively in charge of such tax matters; that a short time back, Mr. W. M. Plake assumed charge of the tax department of and for this corporation and is now the active head thereof.

That the first schedude, or list of assessment, filed as of April 27, 1928, was prepared and filed under a misapprehension of fact and a mistake of fact; that the subsequent schedule, or list, filed as of July 6, 1928, was a corrected list and was made in lieu of the former, to correct the errors and mistakes occurring in the first schedule, or list.

That neither this affiant, nor any member of the Indian Territory Illuminating Oil Company's officers or employees ever had any knowledge, directly or indirectly, that the County Assessor of Payne County failed and refused to accept the supplemental schedule, or assessment list, of

this corporation, and failed and refused to incorporate such supplemental schedule in his assessment roll which he certified to the Board of Equalization and to the Excise Board of Payne County, Oklahoma, until long after the Board of Equalization of Payne County had met for the purpose of equalizing values and hearing protests of assessments, so [fol. 38] that it was impossible for Indian Territory Illuminating Oil Company, or anyone acting for or in its behalf, to meet with said Board of Equalization to protest the assessment of its property as in said completed assessment roll submitted.

That said Indian Territory Illuminating Oil Company desires to protest the assessment of its personal property as the same not appears of record on the Assessment Rolls of said County, and desires to protest the taxes levied against it and appearing on the Tax Rolls of said County, and that this affidavit is made for the purpose of, and as a condition precedent to, a hearing before the Honorable Board of County Commissioners of Payne County for the purpose of hearing protest of said corporation against the Assessment Rolls and the Tax Rolls of said County.

That said Indian Territory Illuminating Oil Company has prepared and tends to said Board of County Commissioners, its formal complaint, in writing, for the purposes above stated, viz: protesting said assessment rolls and said tax rolls of said county, and that said complaint is duly verified, as required by law.

Dated this 2nd day of February, 1929.

E. B. Emanhiser.

Subscribed and sworn to before me this 2nd day of February, 1929. My commission expires Sept. 21, 1932. Bernice Howry, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 39] BEFORE BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, OKLAHOMA

In the Matter of Complaint of the INDIAN TERRITORY ILLUMINATING OIL COMPANY on Account of Erroneous Assessment for the year 1928

NOTICE OF APPEAL

To the Honorable Board of County Commissioners of Payne County:

Whereas, on the 4th day of March, 1929, the Board of County Commissioners of Payne County, Oklahoma, in open session, entered an order of said Board, denying to the Indian Territory Illuminating Oil Company, a certificate of error in erroneous assessment, and denying to said Company a refund of a portion of taxes, which said assessment and which said taxes were and are 1928 assessment and tax.

You are therefore hereby notified that the Indian Territory Illuminating Oil Company will and *cost* appeal from said order of denial of said Board of County Commissioners to the District Court of Payne County, Oklahoma.

Dated this 4th day of March, 1929.

Indian Territory Illuminating Oil Company, by R. L. Gordon, Fred M. Carter, C. E. Wilhite, Its Attorneys.

Service of the foregoing notice of appeal acknowledged this 4th day of March, 1929.

Ed T. Thatcher, Chairman Board of County Commissioners, Payne County, Oklahoma.

[fol. 40] Motion was made by J. H. Radedker and seconded by A. C. Holbrook that the application of I. T. I. Oil Co. for refund of erroneous assessment be denied.

Dated this 4th day of March, 1929.

Ed T. Thatcher, Chairman. J. H. Raedeker, Member. A. C. Holbrook, Member.

Notice of appeal was filed.

Commissioners set the appeal bond at $500.00.

[fols. 41-46] Bond on appeal for $500, approved and filed March 8, 1929, omitted in printing.

[fols. 47 & 48] In District Court of Payne County

No. 9597

In re Assessment of Indian Territory Illuminating Oil Co.

Motion to Dismiss—Filed May 27, 1929

Comes now Ernest F. Jenkins, County Attorney of Payne County, Oklahoma, and for and on behalf of said county of Payne, moves the court to dismiss the purported appeal of the appellant Indian Territory Illuminating Oil Co. herein, for the following reason and on the grounds.

1. That the order of the County Commissioners of Payne County, which the appellant has attempted to appeal from is not an appealable order.

2. That this court is without jurisdiction to hear and determine said appeal.

Ernest F. Jenkins, County Attorney, by Henry W. Hoel, Assistant County Attorney.

[File endorsement omitted.]

[fols. 49 & 50] In District Court of Payne County

No. 9597

In re Assessment of Indian Territory Illuminating Oil Co.

Demurrer—Filed May 27, 1929

Comes now Ernest F. Jenkins, County Attorney of Payne County, Oklahoma, and for and on behalf of said Payne County, Oklahoma, demurs to the purported complaint and appeal of said Indian Territory Illuminating

Oil Co. for the reason that said complaint shows on its face that said appellant is not entitled to the relief and judgment prayed for, and for the further reason that said complaint and purported appeal does not state facts sufficient to enetitled appellant to any relief.

Ernest F. Jenkins, County Attorney, by Henry W. Hoel, Assistant County Attorney.

[File endorsement omitted.]

[fol. 51] IN DISTRICT COURT OF PAYNE COUNTY

No. 9597

In re Matter of the Appeal of the INDIAN TERRITORY ILLUMINATING Oil Company from Board of County Commissioners, Payne County, Oklahoma, in Erroneous Assessment for the Year 1928

ORDER OVERRULING MOTION TO DISMISS AND DEMURRER—Filed May 27, 1929

Now on this 27th day of May, 1929, this case comes on for hearing before the court on the motion of the appellees, the Board of County Commissioners of Payne County, Oklahoma, to dismiss the appeal of the appellant, Indian Territory Illuminating Oil Company, taken in this case. The appellant is present by its attorney, C. E. Wilhite, and the defendants are present by their county attorney, and Assistant County Attorney, Henry W. Hoel. Thereupon the court hears said motion to dismiss, and the argument of counsel thereon, and being fully advised in the premises, orders that said motion to dismiss, be and the same hereby is overruled, to which ruling of the court the appellees except and exceptions are by the court allowed.

Thereupon, the appellees ask leave of the court to file a demurrer to the complaint and appeal of the applicants, above named, which leave is by the court granted.

Thereupon said cause comes on for hearing upon the demurrer of the appellees to the complaint and appeal of the appellants, and all parties being present as above set

out, said demurrer is argued to the court by counsel, and the court being fully advised in the premises, orders that [fol. 52] said demurrer be and the same hereby is overruled, to which ruling of the court the appellees except and exceptions are by the court allowed.

Charles C. Smith, District Judge.

[File endorsement omitted.]

[fol. 53] And thereafter and on the 28th day of May, 1929, this case comes on for trial before the District Court of Payne County, Oklahoma, and the Honorable Judge thereof, without the intervention of a jury: The appellant is present by its attorney, C. E. Wilhite, and the appellees, are present by their attorney, Henry W. Hoel, Assistant County Attorney; and thereupon both sides announce ready for trial and the following record is made to-wit:

[fol. 54] STIPULATION RE CERTAIN OIL IN STORAGE

By Mr. Wilhite: If the court please, it is stipulated and agreed, that the crude oil specified, to-wit: 212,210 barrels stored in tanks in Eagle Township, School District number 91, and 171,097 barrels of oil, stored in tanks in Eagle Township, school District number 102, all in Payne County, Oklahoma, alleged by appellant to have been produced from restricted Indian Leasehold estates in Oklahoma, in the sense that such leasehold estates were the property of restricted Indians, was, in fact, so produced from such leasehold estates by appellant and stored in said tanks in the taxing districts and sub-divisions above set forth.

By Mr. Hoel: We offer in evidence, the County's exhibit "A".

By Mr. Wilhite: No objections.

By the Court: It may be admitted.

(Thereupon, the county or appellee's exhibit "A" having been offered and admitted in evidence, the same is set out here in words, letters and figures as follows, to-wit:

[fol. 55] APPELLEE'S EXHIBIT "A"

Carbon Copy

(On Letterhead of County Assessor of Payne County, Oklahoma)

June 2nd, 1928.

Indian Ter-itori Illuminating Company, Bartlesville, Oklahoma.

DEAR MR. EMENHISER: We are convinced upon investigation that oil from restricted lands is taxable when in storage and for that reason are running on the rolls 171097 barrels in District No. 102 @ .99 and 212210 barrels in No. 91 @ $1.01. This makes your total for 102 $484158 and for 91 $610491.

If you wish to be heard on this I am sure that the Commissioners will be glad to have you arrange for a date with them sometime in next month.

Very sincerely yours, —— ——, County Assessor.

(Attached is receipt for registered article No. 3998, fee paid 15 cents, class postage 1, bearing date June 2nd, 1928.)

(Also the following register return card:)

Return Receipt

Received from postmaster the registered or insured article the original number of which appears on the face of this card.

Ind. Terr. Ill. Oil Co. Duane Rainey (Signature of Addresse-'s Agent).

Date of delivery: Jun. 4, 1928.

Registered article No. 3998. (Postmark:) Bartlesville Okla., June 4, 3 P. M., 1928.

Return to L. W. Wright, Co. Assessor, Stillwater, Oklahoma.

[fol. 56] Assessment List, 1928

For Persons, Firms, Companies, etc., Engaged in Producing, Pumping, Distributing, Mining, or Storing Crude Oil, Natural Gas, Coal, Asphalt, or Other Minerals

List or schedule of property in Eagle Township, school District No. 102, Road District No. —, County of Payne, State of Oklahoma, owned, operated or under the control of Indian Territory Illuminating Oil Company, postoffice address Drawer "L", Bartlesville, Oklahoma, engaged in production of oil and natural gas on the first day of January, 1928

Location: E. ½ S. E. quarter, Sec. 35, Twp. 19, range 6.

23. Steel and iron tanks, size 55,000, 9; value, dollars	49,500
24. Oil on hand (in tanks or bbls., 267,951 value dollars)	265,271

Posted 6-30-28.

(Written in lead pencil:)

Oil from restricted L 171097	169,387
Total	314,771
(In pencil)	169,387
" "	484,158

(All other items on assessment sheet left in blank, and not copied in this exhibit. Everything not indicated in lead pencil is typewritten or printed.)

I, the undersigned affiant, do solemnly swear (or affirm) that I am the secretary of the above named person, firm, company or association; that I have read the within and foregoing statement and schedule, and am familiar with the statements therein contained; that each and all of said statements are true, and that said statement and schedule contains a full, true, complete and correct list and valuation [fol. 57] of the property of said person, firm, company or association as the same existed on January 1, 1928 according to the best of my knowledge, so help me God.

E. B. Emenhiser, Secretary.

Subscribed and sworn to in my presence this 27th day of April, 1928. My commission expires 3-15-1932. Gladys J. Heady, Notary Public. (Seal.)

Indian Territory Illuminating Oil Company

Statement of Oil in Storage, Payne County, Oklahoma, January 1, 1928

Eagle Township, School Dist. #102, E. ½ S. E. 35-19-6

Oil in storage	439,048	
Less oil in storage produced from restricted leases	171,097	$169,386 (Pencil)
Taxable Oil	267,951	

Gravity (average): 38.9°.
Value per bbl.: 99c.
Value: $265,271.49.
Less than 1 yr. old (in pencil).

Tank structures:

9 55,000 bbl. tanks—capacity	495,000 bbl.
Value @ 10¢ per bbl.	49,500.00
Total value	$314,771.49

[fol. 58] Assessment List, 1928

For Persons, Firms, Companies, etc., Engaged in Producing, Pumping, Distributing, Mining, or Storing Crude Oil, Natural Gas, Coal, Asphalt, or Other Minerals

List or schedule of property in Eagle Township, school district No. 91, Road District No. —, County of Payne, State of Oklahoma, owned, operated, or under the control of Indian Territory Illuminating Oil Company, post office address drawer "L", Bartesville, Oklahoma, engaged in production of oil and natural gas on the first day of January, 1928

Location: E. ½ N. E. ¼ Sec. 35, Twp. 19, range 6.

Items		Valuation, dollars
23. Steel and iron tanks size 55,000 No. 11		60,500
24. Oil on hand (In tanks or bbls.) 332,336		335,659
(In pencil:)		
Oil from restricted L	212,210	214,332
(In ink)		549,991
43. Total		396,159
(In pencil)		214,332
" "		610,491

(All other items on sheet in blank and are omitted.)

I, the undersigned affiant, do solemnly swear (or affirm) that I am the secretary of the above named person, firm, company, or association; that I have read the within and foregoing statement and schedule, and am familiar with the statements therein contained; that each and all of said state-[fol. 59] ments are true, and that said statement and schedule contains a full, true, complete and correct list and valuation of the property of said person, firm, company or association as the same existed on January 1, 1928, according to the best of my knowledge, so help me God.

E. B. Emenhiser, Affiant, Secretary.

Subscribed and sworn to in my presence this 27th day of April, 1928. My com. expires 3-15-1932. Gladys J. Heady, Notary Public. (Seal.)

Indian Territory Illuminating Oil Company

Statement of Oil in Storage, Payne County, Oklahoma, January 1, 1928

Eagle Township, School Dist. No. 91, E. ½ N. E. 35-19-6

Oil in storage	544,546 bbls.	
Less oil in storage produced from restricted leases	212,210	$214,332 (Pencil)
Taxable oil	332,336	
(In pencil)	544,546	

Average gravity: 39.0°.
Value per bbl. [75% of $1.64]*: $1.01.
(In pencil:) Less than 1 yr. old.
Total value: $335,659.36.
(In pencil:) 549,991.

Tank structures:

11 55,000 bbl. tanks—capacity	605,000 bbls.
Value @ 10¢ per bbl	$60,500.00
Total value	$396,159.36

[fol. 60] Assessment List, 1928

For Persons, Firms, Companies, etc., Engaged in Producing, Pumping, Distributing, Mining, or Storing Crude Oil, Natural Gas, Coal, Asphalt, or Other Minerals

List or schedule of property in Union township, School District No. 50, Road District No. —, County of Payne, State of Oklahoma, owned, operated, or under the control of Indian Territory Illuminating Oil Company, post-office address Drawer "L," Bartlesville, Oklahoma, engaged in production of oil and natural gas on the first day of January, 1928

Location: Quarter W. ½ S. E. Sec. 15, Twp. 17, Range 5.

Items	Value
24. Oil on hand (in tanks or bbls.) 452,087	443,045
(All other items in blank and omitted.) Posted 6-30-28.	
43. Total	443,045

I, the undersigned affiant, do solemnly swear (or affirm) that I am the secretary of the above named person, firm, company, or association; that I have read the within and foregoing statement of schedule, and am familiar with the statements therein contained; that each and all of said statements are true, and that said statement or schedule contains a full, true, complete and correct list and valuation

[*Stricken in copy.]

of the property of said person, firm, company or association as the same existed on January 1, 1928, according to the best of my knowledge, so help me God.

E. B. Emenhiser, Secretary, Affiant.

[fols. 61 & 62] Subscribed and sworn to in my presence this 27th day of April, 1928. My com. expires 3-15-1932. Gladys J. Heady, Notary Public. (Seal.)

Indian Territory Illuminating Oil Company

Statement of Oil in Storage, Payne County, Oklahoma, January 1, 1928

Union Township, School Dist. No. 50, W. ½ S. E. 15-17-5

Oil in storage	452,087 bbls.
Average gravity: 37.7°.	
Value per bbl. [75% of $1.30]*	.98
(In pencil:) Less than 1 yr. old.	
Value	$443,045.00

NOTE.—This oil located in 9 55,000 bbl. tanks owned by the Carter Oil Company—leased by I. T. I. O. Co.

[fol. 63] IN DISTRICT COURT OF PAYNE COUNTY

No. 9597

In re INDIAN TERRITORY ILLUMINATING OIL COMPANY

STIPULATION AND AGREEMENT AS TO FACTS—Filed July 10, 1929

Comes now the above named appellant, by its attorneys, and the County Attorney for the appellee, and further stipulate and agree:

1. That the County Assessor of Payne County, Oklahoma, on the 2nd day of June, 1928, notified the appellant

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[*Stricken in copy.]

as follows: "We are convinced upon investigation that oil from restricted lands is taxable when in storage and for that reason are running on the rolls 171,097 barrels in District No. 102 @ .99 and 212,210 barrels in No. 91 @ $1.01. This makes your total for 102 $484,158.00 and for 91 $610,-491.00. If you wish to be heard on this I am sure that the Commissioners will be glad to have you arrange for a date with them some time in next month." It is agreed that such notice was mailed by the County Assessor by registered mail and received by appellant on June 4th, 1928.

2. That on the 28th day of February, 1929, the appellant paid to the County Treasurer under protest the sum of $14,077.11 being the first half of its taxes for 1928, covered by the above assessment list, and served the following protest notice on the county treasurer: "You are further advised that there is tendered you the sum of $14,077.11, representing and being one-half of the amount assessed and levied against the company for the personal property as assessed and returned by the county assessor in said county, [fol. 64] of which said sum so tendered you, by said company, is tendered and paid you under protest, the following amounts:

$2,011.63 relating to school Dist. #91 Eagle Twp.
$3,016.14 relating to school Dist. #102 Eagle Twp.

And said Indian Territory Illuminating Oil Company respectfully requests that you hold the tax on such personal property in the amounts shown above separate and apart from all other taxes collected by you, as required by law when payments or tenders are made under protest, and if and within said time, summons shall be served upon you in suit brought by said corporation to recover such tax, that you continue to hold the same until final determination thereof."

3. That on the 13th day of June, 1929, the appellant paid to the County Treasurer under protest the sum of $14,077.11 being the last half of its taxes for 1928, covered by the above asses-ment list, and served the following protest notice on the county treasurer, "You are further advised that there is tendered you the sum of $14,077.11, representing and being one half (last half) of the amount

assessed and levied against this company for and on account of the taxes levied by said county on the assessed valuation of said property, and that of said sum of $14,077.11, so tendered you by said Company, there is tendered you, under protest, the following amounts, to-wit:

$1,568.81 in and for Eagle Twp. S. D. No. 91.
$2,334.05 in and for Eagle Twp. S. D. No. 102.

And said Indian Territory Illuminating Oil Company respectfully requests that you hold said tax on such personal property in the amounts shown above separate and apart [fol. 65] from all other taxes collected by you, and that action will be instituted, and summons served on you within the time prescribed by law, seeking the recovery of said sums so paid to you under protest."

Indian Territory Illuminating Oil Co. Fred M. Carter, C. E. Wilhite, for Appellant. Henry W. Hoel, Asst. Co. Atty., for County Attorney and Appellee.

[File endorsement omitted.]

And this is all of the evidence that was offered and before the Court in the trial and determination of this case.

[fols. 66 & 67] Stenographer's certificate to foregoing transcript omitted in printing.

[fol. 68] In District Court of Payne County

No. 9597

In re Appeal of Indian Territory Illuminating Oil Company from Order and Decision of Board of County Commissioners of Payne County, Oklahoma, in the Matter of Erroneous Assessment for the Year 1928

Journal Entry of Judgment—Filed Aug. 2, 1929

Now, on this 2nd day of August, 1929, the above entitled cause comes on for hearing and decision, the court having taken the same under advisement when the same was tried on May 28th, 1929, at which time both parties announced a desire to present briefs on their respective contentions.

The court being well and fully advised in the premises and upon consideration of the evidence, the stipulations and briefs of the parties hereto, finds the issues in favor of the appellant and against the appellee, Board of County Commissioners of Payne County, Oklahoma. The court finds that the oil, alleged and referred to in the complaint herein, amounting to 383,307 barrels, was produced in Seminole County, Oklahoma, from land belonging to restricted Indians, and thereafter stored in Payne County, Oklahoma, in steel storage tanks at the time when all property in said county was required to be assessed for taxation purposes during the tax year of 1928. That 212,210 barrels of such oil, valued for taxation purposes at $214,326.00, was stored in Eagle Township, School District No. 91, Payne County, Oklahoma, and the remainder, 171,097 barrels valued at $169,396.00 was stored at such time in tanks in Eagle Township, School District No. 102, Payne County, Oklahoma. [fol. 69] That by reason of the fact that such oil was produced from the lands of restricted Indians, the said appellant was acting as a Government instrumentality, and therefore all of said oil was exempt from any and all forms of ad valorem taxation while stored in tanks in Payne County, Oklahoma.

The Court therefore holds that said oil was exempt property, and that the County Assessor of Payne County, Oklahoma, erroneously entered the same upon the tax rolls of said county as the taxable property of said appellant and that a certificate of error should issue by the Board of County Commissioners of said county, cancelling, setting aside and holding for naught the amount of such exempt property assessed against the appellant in school district No. 102, Eagle Township, amounting to $169,386.00, and a further certificate of error, cancelling, setting aside, and holding for naught the amount of such exempt property assessed against the appellant in school district No. 91, Eagle Township, in the sum of $214,322.00, all as prayed for in appeallant's complaint before the said Board of County Commissioners of Payne County, Oklahoma. The court finds that the said appellant has paid under protest to the County Treasurer of Payne County, Oklahoma, on the 28th day of February, 1929, the sum of $14,077.11, representing the first half of its taxes for 1928, which sum includes the taxes on the oil herein found to be exempt for taxation, and that on the 13th day of June, 1929, said ap-

pellant paid to said county treasurer under protest the further sum of $14,077.11 representing the last half of its taxes for 1928, which sum included the taxes on the oil herein found to be exempt from taxation. The court therefore finds that said appellant is entitled to a refund of [fols. 70 & 71] $7,805.72, that being the amount of the taxes it has paid as aforesaid on such exempt property.

It is therefore ordered, adjudged and decreed, by the court, that the Board of County Commissioners of Payne County, Oklahoma, appellee herein, order a refund to the appellant Indian Territory Illuminating Oil Company in the total amount of $7,805.72, that being the amount of the illegal taxes on a valuation of $169,386.00 in school District No. 102, Eagle Township, Payne County, Oklahoma, the amount of such illegal taxes in said school district being $4,668.12, and the remainder of said refund $3,137.60 being the amount of such illegal taxes on a valuation of $214,-332.00 in said school District No. 91, Eagle Township, Payne County, Oklahoma, and being the amount of taxes paid on said 383,307 barrels of oil in storage in both of said school districts in Eagle Township, Payne County, Oklahoma, which said oil was produced from lands owned by restricted Indians in Seminole County, Oklahoma, and to all of which judgment and orders of the court the appellee, board of County Commissioners of Payne County, Oklahoma, objects and excepts, which objections and exceptions are by the court allowed.

Charles C. Smith, District Judge.

OK. Ernest F. Jenkins, County Attorney.
OK. C. E. Wilhite, Attorney for Appellant.

[File endorsement omitted.]

[fol. 72] In District Court of Payne County

No. 9597

In re Appeal of Indian Territory Illuminating Oil Company from Order and Decision of Board of County Commissioners, Payne County, Oklahoma, in the Matter of the Erroneous Assessment for the Year 1928

Motion for New Trial—Filed Aug. 2, 1929

Comes now the appellee, Payne County, State of Oklahoma, and the Board of County Commissioners of said

county and moves the court to vacate and set aside the verdict and judgment rendered herein on the 2nd day of August, 1929, and to grant a new trial for the following causes which affect materially the substantial rights of the said appellee.

First. Error of the said District Court in overruling and denying appellee's motion to dismiss the pretended appeal from the order and decision of the Board of County Commissioners.

Second. Error of the said District Court in overruling and denying appellee's demurrer to said appeal.

Third. That the verdict and judgment of said court is not sustained by sufficient evidence, and is contrary to law.

Fourth. That the said verdict and judgment is not sustained by the law and the evidence.

Fifth. That the court erred in rendering judgment for appellant and in not rendering judgment for appellee.

Ernest F. Jenkins, County Attorney, by Henry W. Hoel, Assistant County Attorney.

[fol. 73] [File endorsement omitted.]

[fol. 74] IN DISTRICT COURT OF PAYNE COUNTY

No. 9597

In the Matter of the Appeal from the Board of County Commissioners, Payne County, Oklahoma, on Complaint of INDIAN TERRITORY ILLUMINATING OIL CO. on Account of Erroneous Assessment for the Year 1928

JOURNAL ENTRY OF ORDER OVERRULING MOTION FOR NEW TRIAL—Filed Aug. 2, 1929

On this 2nd day of August, 1929, there came on for hearing the motion of the defendant and appellee herein for a new trial, appellant being present by its attoreny, Mr. Murphy, and the appellee by the county attorney, Ernest F. Jenkins, and Assistant County Attorney, Henry W. Hoel. The court, having heard the arguments of counsel and be-

ing well and fully advised in the premises, and upon consideration thereof finds that the said motion for a new trial should be and the same hereby is overruled and denied.

It is therefore ordered and adjudged that the motion of the appellee for a new trial be, and the same is hereby overruled and denied; to which ruling of the court the appellee then and there excepted and gave notice in open court of its intention to appeal to the Supreme Court of the State of Oklahoma.

And the said appellee, praying an appeal to the Supreme Court, and an extension of time within which to make and serve a casemade, it is ordered that an extension of sixty days from this date be granted to said appellee and to make and serve a casemade, appellant to have ten days there- [fols. 75 & 76] after to suggest amendments, same to be settled on five days' notice in writing by either party.

Charles C. Smith, Judge of the District Court.

[File endorsement omitted.]

[fol. 77] In District Court of Payne County

Resolution Authorizing Appeal—Filed Sept. 16, 1929

Be it resolved by the Board of County Commissioners of Payne County, State of Oklahoma:

Whereas, on the 2nd day of August, 1929, in the District Court within and for Payne County, State of Oklahoma a certain judgment was rendered in cause No. 9597, entitled "In re: appeal of Indian Territory Illuminating Oil Co., from order and decision of the Board of County Commissioners of Payne County, Oklahoma, in the matter of erroneous assessment for the year 1928." And that said judgment was in favor of said Indian Territory Illuminating Oil Co., appellant, and against the Board of County Commissioners of Payne County, Oklahoma, as more fully appears by the journal entry of judgment filed in said cause.

And whereas, on the same day and date, and in the same cause, there was a further judgment rendered, and order of the court entered, overruling the motion of said Board

of County Commissioners for a new trial in said cause, as will be more fully shown from the journal entry of said order, filed in said cause.

Now, therefore, be it resolved by the Board of County Commissioners of Payne County, that it is for the best interest of said Payne County, that said cause be appealled to the Supreme Court of the State of Oklahoma, and it is the order of said Board that the County Attorney of Payne County, State of Oklahoma, appeal said cause to the Supreme Court of the State of Oklahoma, and to take any and all necessary steps for a full, final and complete hearing of said cause in the Supreme Court of the State of Oklahoma.

[fol. 78] Passed and approved this 16th day of September, 1929.

Ed T. Thatcher, Chairman of the Board of County Commissioners of Payne County, State of Oklahoma.

Attest:

V. A. Doty, County Clerk. (Seal.)

I, V. A. Doty, County Clerk in and for said county and state, do hereby certify that the foregoing resolution is a true, complete and correct copy of the original as the same appears on file and of record in my office.

Given under my hand and seal of my office this 16 day of Sept. A. D. 1929.

V. A. Doty, County Clerk. (Seal.)

Filed Payne County, Oklahoma, Sep. 16, 1929.

V. A. Doty, County Clerk.

[File endorsement omitted.]

[fol. 79] In District Court of Payne County

Statement re Transcript

The above and foregoing is a full, true, correct and complete copy and transcript of all the pleadings, motions, orders, evidence, findings, proceedings and judgments in said cause, including all the orders and rulings made, all

the exceptions allowed, all of the evidence offered or introduced, and all of the record upon which the judgment and journal entry in said cause were made.

[fol. 80] IN DISTRICT COURT OF PAYNE COUNTY

No. 9597

In the Matter of the Appeal of the INDIAN TERRITORY ILLUMINATING OIL COMPANY, etc., etc.

CERTIFICATE OF ATTORNEYS—Filed Oct. 7, 1929

We hereby certify that the foregoing casemade contains a full, true, correct and complete copy and transcript of all the proceedings in said case, including all pleadings filed and proceedings had. All the evidence offered or introduced by both parties, all orders and rulings made and exceptions allowed. And all of the records upon which the judgment and journal entry in said cause were made and entered, and that the same is a full, true, correct and complete casemade.

Witness our hands this 28 day of September, 1929.

Fred M. Carter, C. E. Wilhite, Attorneys for Appellants. Henry W. Hoel, Ernest F. Jenkins, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 81] IN DISTRICT COURT OF PAYNE COUNTY

No. 9597

In the Matter of the Appeal of the INDIAN TERRITORY ILLUMINATING OIL COMPANY, etc.

SERVICE OF CASE-MADE

We, the undersigned attorneys for the appellants in the above and foregoing cause do hereby acknowledge service

of the foregoing casemade this the 28" day of September, 1929.

Fred M. Carter, C. E. Wilhite, Attorneys for Appellants.

[fol. 82] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] IN DISTRICT COURT OF PAYNE COUNTY

No. 9597

In the Matter of the Appeal of the INDIAN TERRITORY ILLUMINATING OIL COMPANY, etc.

WAIVER OF AMENDMENTS

We, the undersigned attorneys for the appellant- and appellee in the above entitled cause do hereby waive the suggestion of any amendments to the above and foregoing casemade.

Dated this the 28" day of September, 1929.

Fred M. Carter, C. E. Wilhite, Attorneys for Appellants. Henry W. Hoel, Ernest F. Jenkins, Attorneys for Appellee.

[fol. 84] IN DISTRICT COURT OF PAYNE COUNTY

No. 9597

In the Matter of the Appeal of the INDIAN TERRITORY ILLUMINATING OIL COMPANY, etc.

WAIVER OF NOTICE OF TIME AND PLACE OF SETTLEMENT

We, the undersigned attorneys for the appellants in this case, do hereby waive any notice of the time and place of the signing and settlement of the above and foregoing casemade.

Dated this 28" day of September, 1929.

Fred M. Carter & C. E. Wilhite, Attorneys for Appellants.

[fol. 85] IN DISTRICT COURT OF PAYNE COUNTY

No. 9597

In the Matter of the Appeal of THE INDIAN TERRITORY ILLUMINATING OIL COMPANY from Board of County Commissioners of Payne County, Oklahoma, in Erroneous Assessment for 1928

NOTICE OF SETTLEMENT OF CASE-MADE

To the Indian Territory Illuminating Oil Company, a corporation, appellant herein, and to R. L. Gordon, Fred M. Carter, and C. E. Wilhite, attorneys of record for said appellants:

You and each of you are hereby notified that on the — day of ——, 1929, at the hour of — o'clock — M. of said day in the office of the Hon. Charles C. Smith, Judge of the District Court of Payne County, Oklahoma, in the city of Stillwater, Payne County, Oklahoma, the appellee herein, the Board of County Commissioners of Payne County, Oklahoma, will present to the said Charles C. Smith, as the judge presiding at the trial of said cause, the case-made therein on appeal to the Supreme Court of the State of Oklahoma, for settlement and signing, which case-made was served on you on the — day of ——, 1929.

—— ——, Attorney for Appellant.

Service of the above and foregoing notice is hereby acknowledged to have been made on us this — day of ——, 1929.

—— ——, Attorneys for Appellant.

[fol. 86] IN DISTRICT COURT OF PAYNE COUNTY

No. 9597

In the Matter of the Appeal of THE INDIAN TERRITORY ILLUMINATING OIL COMPANY, etc.

ORDER SETTLING CASE-MADE

STATE OF OKLAHOMA,
County of Payne, ss:

I, the undersigned Judge of the District Court of the Eleventh Judicial District of Oklahoma, do hereby certify

that the foregoing was presented to me as a case-made in the action above entitled; that at the time of the presentation of said case-made to me for settlement and signing, there appeared no one for the appellees, and Henry Hoel for the appellants; that there were no suggestions of amendments made to said casemade; and I now settle and sign the same as a true and correct casemade, and direct that it be attested and filed by the clerk of said court.

Witness my hand at Stillwater, Payne County, Oklahoma this 7 day of Oct., 1929.

Charles C. Smith, District Judge.

Attest:

Dewey Dobson, Court Clerk. (Seal.)

[fols. 87 & 88] [File endorsement omitted.]

Certificate of filing omitted in printing.

[fol. 89] IN SUPREME COURT OF OKLAHOMA

20878

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, STATE OF OKLAHOMA, Plaintiff in Error,

vs.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, a Corporation, Defendant in Error

JUDGMENT—May 17, 1932

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed and the cause remanded.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and the cause remanded with

directions to proceed consistent with the opinion filed therein.

Opinion by Kornegay, J.

[fol. 90] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 20878

In re Appeal of INDIAN TERRITORY ILLUMINATING OIL COMPANY from an Order and Decision of the Board of County Commissioners of Payne County, State of Oklahoma, in the Matter of Erroneous Assessment for the Year 1928

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, STATE OF OKLAHOMA, Plaintiffs in Error,

vs.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, Defendant in Error

Syllabus

1. The oil in this case, produced in a previous year from a restricted Indian allotment, was by the oil company moved from Seminole County and placed in storage in Payne County, mixed with other oil belonging to the company, and was there located on January 1, 1928. Held, that it was subject to ad valorem taxes imposed by State law and the county assessor had a right to assess it for such taxes.

2. The lower court erred in ordering the county commissioners to issue a certificate of erroneous assessment.

Error from the District Court of Payne County, Oklahoma

Honorable Charles C. Smith, Judge

Reversed

Ernest F. Jenkins, County Attorney; Henry W. Hoel, Ass't Co. Atty., for Plaintiffs in Error.

Fred M. Carter, C. E. Wilhite, Bartlesville, for Defendant in Error.

[fol. 91] OPINION—Filed May 17, 1932

KORNEGAY, J.:

This is a suit to review the action of the district court of Payne county, requiring the board of county commissioners to strike from the list of assessed property of the Indian Territory Illuminating Oil Company, for the year 1928, some oil produced from a restricted allotment in Seminole county, the judgment being rendered on the 20th of August, 1929. The journal entry of judgment embraces three pages of the record, but the matters were simplified, largely by an agreed statement of facts, and the brief of the plaintiff in error states that the sole question in the case is whether or not oil that was produced in Seminole county by the Indian Territory Illuminating Oil Company some time prior to the 1st of January, 1928, under a lease on restricted Indian land, and which was in storage in Payne county in January, 1928, mixed with other oil, was subject to taxation as property in Payne county for that year, and if so, has the Indian Territory Illuminating Oil Company proceeded in the manner prescribed by law for the purpose of correcting the assessment of said property for taxation on that property in that county during that year?

Just when this oil was produced, the record is not explicit on. The basis of the decision was that the Indian Territory Illuminating Oil Company was acting as a governmental agency, and the order was made that the county commissioners should issue a certificate of error, taking from the tax roll in School District No. 102, Eagle Township, the amount of this oil, $169,386.00, and district No. 91 the amount of $214,322.00, the remainder of the judgment providing the relief awarded to the Indian Territory [fol. 92] Illuminating Oil Company in the way of refund of taxes, etc.

The county commissioners refused to take this off of the assessment list, and the Indian Territory Illuminating Oil Company appealed to the District court with the results above set out. It appears to us in this case that this oil being a part of the property of the Indian Territory Illuminating Oil Company, and having been moved from the wells where produced and mingled with other oil, had become a part of the mass of property of Payne county, and

was subject to ad valorem tax just as the farmers' horses, and the oil in storage that was produced from wells of other citizens of the State.

Several cases are cited from this court and other courts, and especially the Supreme Court of the United States, from which the deduction is made by the oil company that it could escape taxation during the year 1928 on this oil on account of the way it had been produced. The point is made that a full blood Indian was a ward of the United States, and therefore in developing his land for oil, the Indian Territory Illuminating Oil Company became the United States' agent, and that what it got out of it was free from taxation imposed and required by the State for its support.

We think this position ignores the rights of the State of Oklahoma and its history. Some of the citizens of the State are classed as wards of the United States, as a foundation for the deduction that the Indian Territory Illuminating Oil Company does not have to pay taxes upon its personal property, that at one time was in the ground, that had been allotted to a full blood Indian. If the Indian is a ward of the United States, when one takes the Enabling act of 1906 and reads it, it would appear that the State of Oklahoma was the child of the United States. It is necessary that it have revenue as a means of performing its functions, and to say that the United States government [fol. 93] has saved the oil in question from the taxing power of the State, would scarcely agree with the ideas of allowing the State to function and get the means to function, when required to afford to the owner of the land and the lessee the equal protection of the law, and furnish police protection for the property.

It also would scarcely be consistent with the duty of the United States towards the other Indians of the State, and towards the other taxpayers of the State. By virtue of the Enabling act, all Indians of the Five Civilized Tribes became citizens of the State, entitled to its protection and subject to its laws in large measure, and if we recognize that expenses of government are largely drawn from taxation, which is assessed against real estate, unless there is an overwhelming reason for it, we ought not to hold that property derived by citizens of the State and other states, by virtue of boring into the ground and getting oil and

bringing it to the surface and putting it into the channels of commerce, is exempt from tax.

By the terms of the Enabling act, certain restrictions were thrown around the people of the State, but when one analyses the Constitution of the United States, and finds the provisions about admitting states, and examines the case of Coyle v. Smith, 55 L. ed. 855, decided by the Supreme Court of the United States, holding invalid the limitation sought to be imposed on the people of the State of Oklahoma as to the location of its capitol, it is scarcely consistent to say that the taxing power of the state in this case does not extend to the oil that is here involved, in view of its character and location and ownership at the time of the tax assessment.

The case of Jaybird Mining Company v. Weir, 271 U. S. 609, 70 L. ed. 1113, decided by the Supreme Court of the [fol. 94] United States, is relied upon by the oil company as exempting it from taxation. When one analyses the cases that are relied upon in that case for the exemption there allowed, he will find that they all go back to the original case of Choctaw, Oklahoma & Gulf Ry. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234. The opinion says, "the lessee is an agency or instrumentality employed by the government for the development and use of the restricted land and to mine ores therefrom for the benefit of its ward," and the case of Choctaw, Okla. & Gulf Ry. Co. v. Harrison, cited above, is cited and relied on. In the Harrison case it was held that the tax complained of was an occupational tax, and the leases in that case were tribal leases to start with, and the property was still common Indian property, and the royalties were required to be paid into the treasury of the United States, and the matter was subject from time to time to regulation by government. It was there clearly held that calling it a substitute propery tax would not help the matter, and in the body of the opinion we find the following:

"Neither state courts nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect. Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638.

"It is unnecessary to consider the power of the state of Oklahoma to treat coals dug from mines operated by the

appellant as other personalty, and to subject them to a uniform ad valorem tax, for it seems to us clear that the act of 1908 provided for no such imposition. Its very language imposes a 'gross revenue tax which shall be in addition to the taxes levied and collected upon an ad valorem basis.' We cannot, therefore, conclude that the gross receipts were intended merely to represent the measure of the value of property liable to a general assessment—provision is made for determining that upon a different basis. Meyer v. Wells, F. & Co., 223 U. S. 298, 301, 56 L. ed. 445, 447, 32 Sup. Ct. Rep. 218. The requirement is not on account of property owned on a given day, as is the general custom where ad valorem taxes are provided for, and as the Oklahoma laws require; but the manifest purpose is to reach all sales and secure a certain percentage thereof,—a method com- [fol. 95] monly pursued in respect of license and occupation taxes. Pullman Co. v. Knott (decided at the present term, 235 U. S. 23, ante, 105, 35 Sup. Ct. Rep. 2).

"A tax upon a merchant's manufacturer's, or miner's gross sales is not the same thing as one on his stock treated as property. Cooley, Taxn. 3d. ed. p. 1095. The former is upon his business. In effect, the Oklahoma act prescribes an occupation tax (Ohio Tax Cases, 232 U. S. 576, 592, 58 L. ed. 738, 745, 34 Sup. Ct. Rep. 372); and, accepting as true the allegations of appellant's bill, we think it cannot lawfully be subjected thereto. The decree of the court below is reversed, and the cause remanded for further proceedings in conformity with this opinion."

With that as a basis, most of the decisions since have been pronounced, and the Jaybird Mining Company case is an extension of that idea beyond its normal expanse, as it would seem from the dissenting opinions filed therein. An analysis of the C., O. & G. Ry. Co. v. Harrison, case, the foundation of the case shows that it was tribal property based on contracts made before the state. The income tax idea appears to be somewhat different from that of a property tax, as some are required to pay on property, ad valorem, and on the income derived therefrom.

On the whole, these cases seem to be based largely upon the idea of a governmental agency helping one class of Indians protect themselves as against the greed of their fellows, as distinguished from the idea of interfering with

a property tax upon that which has been derived from such property and its ownership transferred to a corporation, and has become a part of the mass of property of the citizens of the state. However, the idea of governmental agency, as applied to the oil in this case, can well be extended both forward and backward. If extended backward, when the government, with like duties owing to its Indian wards, allowed certain classes to make their own contracts, without supervision of the government, and allowed the share of the Indian land owner and the share of the product belonging to the operator, produced as result of labor in extraction, each to be subject to state tax, while the opera- [fol. 96] tors' share, working on restricted land, is exempt, equality in burden bearing no longer exists. The operator on the restricted land has the advantage. The enabling act requires, that the State Constitution shall "make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The Supreme Court of the United States in a subsequent case, however, of Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 72 L. ed. 709, had for consideration the question again, and after the Jaybird Mining Company case was passed on. In that case the Secretary of the Interior had, with restricted funds, bought property which was conveyed to an allottee by deed carrying restrictions against alienation. It was leased out under the supervision of the Secretary, and there was production of oil. Elaborate briefs were filed in the case, and the court, in dismissing the matter, after enumerating some of the decisons and the statutory requirements, concludes the opinion as follows:

"Little need be said as to the power of the Secretary of the Interior to exempt the land and its uses from taxation. The power, if it exists, is one conferred by Congress, but neither it nor the Secretary has in terms purported to make or authorize such an exemption.

" The Act of May 27, 1908, contains no express exemption from taxation of the proceeds of restricted lands, but sec. 4 expressly subjects lands from which restrictions

have been removed to state taxation. This section was adopted in response to representations that the revenue of the state of Oklahoma was insufficient for state purpose, that large areas of lands within the state allotted to Indians were exempt from taxation as agencies of the Federal government and that Indian citizens were enjoying the benefit of local government without taxation. Report of the Senate Committee on Indian Affairs, S. Rep. No. 575, 60th Cong. 1st Sess.; Report of the House Committee on Indian Affairs, H. Rep. No. 1454, 60th Cong. 1st Sess.

"At the time of this legislation restrictions on some allotted lands had been removed by reason of the expiration of the restricted period. There were also allotments on behalf of allottees dying before allotment which in the hands of their heirs were unrestricted. See Marchie Tiger [fol. 97] v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578. It cannot be assumed that Congress at a time when it was withdrawing allotted lands from their former exemption in order that Indian citizens might assume the just burdens of state taxation, intended to extend a tax exemption by implication. In any cause the Secretary of the Interior has never, by rule or regulation or other action, purported to exempt such lands from state taxation. No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land. See U. S. v. Ransom, 263 U. S. 691, 68 L. ed. 508, 44 Sup. Ct. Rep. 230, affirming (C. C. A. 8th) 284 Fed. 108; U. S. v. Brown (C. C. A. 8th) 8 F. (2d) 564; U. S. v. Gray (C. C. A. 8th) 284 Fed. 103; U. S. v. Mummert (C. C. A. 8th) 15 F. (2d) 926.

"Question 1. Answered No.

"Question 2. Answered No."

The first question answered in the negative was as follows:

"Had the Secretary of the Interior, on October 24, 1915, when this land was purchased, power to exempt from such state taxation land purchased under his supervision for a full blood Creek Indian with trust funds of that Indian, where the land so purchased was, at that time, subject to all state taxes?"

The second question is as follows:

"Is this tax a forbidden tax upon a Federal instrumentality?"

As applied to this case, under the agreed statement of facts, at some indefinite time the oil had been produced from a restricted allottment under a departmental lease. however, it happened to have been moved about 100 miles and stored sometime before the 1st of January, 1928, in some storage tanks along with some other oil that we do not know the origin of. Under the Constitution of the State of Oklahoma, exemptions from taxation are scarcely permitted, though there are some instances where there might be. This does not happen to be one of the enumerated cases. Our law upon the subject of tax exemption is fairly well illustrated in some of the cases that we have had, one being Wenner v. Mothersead, 129 Okl. 273, 264 P. 816, wherein the question came up as to whether or not real estate in the hands of the bank commissioner, engaged in liquidating a state bank for the benefit of the depositors under state law, was before the court for consideration, [fol. 98] and at page 275 of that report the court says:

"Besides, section 50, art. 5 of the Constitution provides:

" 'Sec. 50. The Legislature shall pass no law exempting any property within this state from taxation, except as otherwise provided in this Constitution.'

"And section 46, subdivision (U) of article 5, Id., provides:

" 'The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law * * *.

" '(U) Exempting property from taxation.'

"The rule governing the claim of exemption from taxation is emphatically and clearly stated in Tulane Educational Funds v. Board of Assessors, 35 La. Ann. 668, as follows:

" 'Exemptions from taxation are always strictly construed against the exemption, nothing can be supplied by intendment or inference.'

"The rule is stated by this court in Oklahoma City v. Shields, 22 Okl. 265, 100 P. 559, as follows:

"'Claims of exemption * * * must be * * * by express grant."

"See, also 37 Cyc. 891; 26 R. C. L. pp. 302, 313.

"The property in question not being mentioned in said section 6, art. 10, of the Constitution, and under said section 46 (U), art. 5 of the Constitution, and section 50, Id., the Legislature being without power to exempt property except as provided in the Constitution, and the recognized rule being that property is never exempted except by specific, definite provisions of law, it follows that the property involved herein is not exempt, but is subject to taxation, and that the honorable trial court erred in granting the order of injunction herein appealed from."

If the position of the oil company is here tenable, it could erect a refining plant in which nothing except oils from restricted land was used, and dispose of the gasoline so produced tax free. The same with agricultural products, produced under leases, approved by the Secretary of the Interior, though not so when produced under a lease not exceeding a year in duration.

The duty of the Indian and the white man both, to pay taxes to support the government of the State of Oklahoma, is fairly well expressed by a federal decision in the case of Central Coal & Coke Co. v. Carseloway Co., Assessor, 45 F. (2d) 744, decided by the Circuit Court of Appeals for the 10th Circuit, as follows:

"It is clear that the plaintiffs own properties of large value, situate in Oklahoma. Their ownership is secure because Oklahoma maintains a stable government. If plaintiffs need no contribute to the maintenance of that government, while enjoying the benefits thereof, some all-sufficient reason should appear."

[fols. 99 & 100] We think that reasoning applies here. There is no reason why the Indian Territory Illuminating Oil Company should not pay taxes upon this oil, as it enjoys the protection of the State government. There is neither defined exemption by positive law, or undefined exemption from rules of policy.

The case is reversed, with directions to the court below to revoke its order directing the county commissioners to strike this property from the assessment roll, and requir-

ing the board of county commissioners to order a refund of taxes paid under protest by the oil company in the aggregate of $7,805.72. The tax collecting authorities of Payne county are directed to take the necessary steps to collect the amount rebated with penalties in case the money has been returned to the oil company. The defendant in error will be taxed with the costs here and in the court below.

Riley, Hefner, Cullison, Swindall, Andrews, and McNeill, JJ., concur. Lester, C. J. and Clark, V. C. J., absent.

[fol. 101] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 102] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Sept. 14, 1932

Comes now Indian Territory Illuminating Oil Company, the appellant in the above entitled cause, and states that the points upon which it intends to rely in this Court in this case as as follows:

Point 1. That the Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Payne County, Oklahoma, and in holding and deciding that the said District Court of Payne County, Oklahoma, erred in holding that the property sought to be taxed in this cause was not subject to ad valorem taxation for the year 1928 by the State of Oklahoma or any political subdivision thereof.

Point 2. That the Supreme Court of the State of Oklahoma erred in refusing to affirm the judgment of the District Court of Payne County, Oklahoma.

[fol. 103] Point 3. That the Supreme Court of the State of Oklahoma erred in holding, deciding, and determining that Section 9574 and succeeding sections of Chapter 84,

Compiled Oklahoma Statutes 1921, particularly Sections 9814, 9627 and 9614, which provide for the assessment levy and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma during any given tax year are valid when applied to crude petroleum produced from the allotment of a restricted Seminole Indian in Seminole County, Oklahoma, by a lessee under a lease executed by such restricted allottee and duly approved by the Secretary of the Interior, and while the oil so produced is still owned and held in storage in its original state and not disposed of by said lessee and in rendering a decision in favor of the validity of said Statutes when applied to and constructed to cover the property sought to be taxed in this cause, and in not holding under the facts in this cause that said Statutes as so applied are repugnant to the Constitution, Treaties, and Laws of the United States.

Point 4. The Supreme Court of the State of Oklahoma erred in holding, deciding, and determining that the acts of the County Assessor, the County Treasurer and the Board of County Commissioners of Payne County, State of Oklahoma, and the authority exercised by them and each of them under the authority conferred and vested in them by the said Statures of the State of Oklahoma mentioned specifically in assignment number 3 herein and above set forth, and other statutes of the State of Oklahoma author-
[fol. 104] izing the assessment of an ad valorem tax on the property involved in this cause for the period in question are valid, and in rendering a decision in favor of their validity and in not holding said Statutes and the authority so exercised by the officials aforesaid under said Statutes repugnant to the Constitution, Treaties, and Laws of the United States.

Point 5. That the Supreme Court of the State of Oklahoma erred in sustaining the above mentioned Statutes of the State of Oklahoma, authorizing the assessment, levy and collection of ad valorem tax on the crude oil involved in this case, said crude oil being held in storage, unsold and in its original state throughout and during the entire tax period in question by the petitioner herein, and said crude oil having been by the petitioner produced solely under an

oil and gas lease upon restricted Seminole lands under the control of Congress and the Secretary of the Interior.

Point 6. That the Supreme Court of the State of Oklahoma erred in its decision denying that the said crude oil produced by the petitioner is and was exempt from ad valorem taxation as claimed by the petitioner under the Constitution, Treaties, and Laws of the United States.

And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

[fol. 105]

Title of paper	Record page
Citation and Service	1
Petition for Appeal to the Supreme Court of the United States	3
Assignment of Errors	9
Order Allowing Appeal	14
Bond, Showing Approval	15
Præcipe for Transcript of Record and Service	17
Petition in Error	19
Case-Made	22
Journal Entry of Judgment of Supreme Court of Oklahoma	89
Opinion of Supreme Court of Oklahoma	90
Clerk's Certificate	100

John H. Miley, Counsel for Appellant.

[fols. 106 & 107] STATE OF OKLAHOMA,
Washington County, ss:

Donald Prentice, being first duly sworn, deposes and states that on the 8th day of September, 1932, he delivered a full, true and correct copy of the Statement of Points To Be Relied Upon and Designation of the Parts of the Record to Be Printed hereto attached to Ernest F. Jenkins, County Attorney of Payne County, State of Oklahoma, and attorney of record for Board of County Commissioners of Payne County, State of Oklahoma.

Donald Prentice.

Subscribed and sworn to before me this 9th day of September, 1932. My commission expires July 5, 1934. Mabel Bellamy, Notary Public. (Seal of Mabel Bellamy, Notary Public in and for State of Oklahoma, Bartlesville, Okla.)

[fol. 108] [File endorsement omitted.]

Endorsed on cover: File No. 37,054. Oklahoma Supreme Court. Term No. 357. Indian Territory Illuminating Oil Company, appellant, vs. Board of County Commissioners of Payne County, Oklahoma. Filed September 8, 1932. File No. 37,054.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 12, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.
FILED
OCT 7 1932
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

VS.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY,
STATE OF OKLAHOMA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION ON APPEAL

JOHN H. MILEY,
Counsel for Appellant.

Utterback Typesetting Co., Oklahoma City

NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY,
STATE OF OKLAHOMA,
Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL

May It Please the Court:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

STATUTORY PROVISIONS BELIEVED TO SUSTAIN THE JURISDICTION

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. at L. 936, 937 (United States Code, Title 28, Section 344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "Sec. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the

validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, C. 14, Sec. 1, 45 Stat. 54, entitled "An Act in Reference to Writs of Error," provides:

"The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of April 26, 1928, C. 440, 45 Stat. 466, amending the Act of January 31, 1928, C. 14, Sec. 2, 45 Stat. 54, provides:

"The statutes regulating the right to a writ of error, defining the relief which may be had thereon and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to courts, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

DATE OF JUDGMENT AND DATE OF APPLICATION FOR APPEAL

The judgment sought to be reviewed was entered on the 17th day of May, 1932 (R. 89, 90).*

The application for appeal was presented on the 12th day of August, 1932 (R. 13).

C.

NATURE OF CASE AND RULING BELOW

The question involved in this case, which is virtually the same as the question involved in the case of *Indian Territory Illuminating Oil Company* v. *Board of Equalization of Tulsa County, Oklahoma*, No. 356, now pending before this Court, is whether 383, 307 barrels of crude oil located in certain tanks in Payne County, State of Oklahoma, on January 1, 1928, were subject to assessment for ad valorem taxation by the taxing agencies of the State of Oklahoma and the municipalities thereof, for the year 1928 (R. 32, 33).

The oil in question was produced by the appellant, prior to January 1, 1928, from lands located in Seminole County, Oklahoma, owned by Seminole allottees, members

*All references to the record are to pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Oklahoma and on file with the Clerk of this Court. The record has not yet been printed.

of the Seminole tribe of Indians, as their individual allotments, from which restrictions against alienation imposed by Acts of Congress had not been removed (R. 32, 33, 54, 68, 70, 91, 97). The oil was produced by appellant under and pursuant to leases executed by the several allottees and approved by the Secretary of the Interior pursuant to the authority of the Act of Congress approved May 27, 1928 (35 Stat. L. 312), (R. 54, 68, 91, 97). The said oil so produced, together with other oil, was immediately after production piped into the storage tanks where it has remained since in its original state. The said oil so produced by appellant had not been disposed of by it from the time of production thereof, until and throughout the entire tax period in question (R. 31-34, 54, 68, 91).

The assessing officers of the State of Oklahoma claim that such oil is subject to assessment for ad valorem taxation for the support of state government and the several political subdivisions thereof for the year 1928, by virtue of certain statutes of the State of Oklahoma, particularly, to-wit: Sec. 9814, Compiled Oklahoma Statutes, 1921, which imposes a gross production tax upon crude oil at the time of production, in lieu of any other tax thereon for the year in which it is produced, but which provides that:

> "* * * oil in storage * * * produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

Sec. 9627, C. O. S., 1921, provides that:

> "It shall be the duty of the * * * assessor * * * in which tanks * * * for the storage of crude petroleum are located to assess as other property is assessed to the proper owners at the fair cash value, as hereinbefore defined, any and all such tanks and the contents thereof."

And Sec. 9666, C. O. S., 1921, as amended by Ch. 209, Session Laws, Oklahoma, 1927, p. 258, provides:

> "The County Assessor shall on the 15th day of January of each year, proceed to take a list of all taxable property in the county and assess the value thereof as of January first * * *."

It is the contention of the appellant that such statutes of the State of Oklahoma and other provisions of Ch. 84, C. O. S., 1921, relating to Revenue and Taxation, providing for the assessment, levy, and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma are invalid when applied to the crude oil in question, because repugnant to the Constitution, treaties, and laws of the United States, in that the appellant is an agency or instrumentality employed by the Government of the United States for the development and use of the restricted land of its Indian wards for their benefit. (*Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Large Oil Co.* v. *Howard,* 248 U. S. 549; *Howard* v. *Oil Companies,* 247 U. S. 503; *Choctaw O. & G. R. Co.* v.

Harrison, 235 U. S. 292; *McCulloch* v. *Maryland,* 4 Wheat 316).

The validity of the statutes of the State, as applied to the oil in question on the ground aforesaid, was drawn in question at the inception of the proceeding and maintained throughout, and the final decision of the Supreme Court of the State of Oklahoma, from which this appeal was taken, was in favor of the validity of the Statute as so applied.

The appellant, in preparing and filing with the County Assessor its corrected assessment list or schedule of property located in Payne County, Oklahoma, claimed that notwithstanding said State Statutes, the said oil was not subject to taxation under the Constitution, laws and treaties of the United States (30 Stat. L. 567; 34 Stat. L. 137; 35 Stat. L. 312; 45 Stat. L. 495 and 34 Stat. L. 267), which claim was denied and the said property was added to the assessment roll as property subject to ad valorem taxation for the year 1928, and a tax of $7,805.72 was levied against said oil for said year (R. 28-31, 37, 70).

Thereupon the appellant, as provided by the laws of the State of Oklahoma, paid the first half of said tax under protest (R. 63, 69) and thereafter duly filed in the office of the County Clerk (R. 26), its complaint wherein the appellant prayed that the Board of County Commissioners of Payne County, Oklahoma, the appellee herein, issue its certificate in error cancelling and setting aside the tax levy

on the crude oil as aforesaid and further, that it order a refund to the petitioner of so much of the said tax on said oil as had been paid (R. 34, 35). After a hearing as provided by the laws of the State of Oklahoma, the appellee denied the relief therein prayed for (R. 26) whereupon the appellant in accordance with the laws of the State of Oklahoma, duly appealed to the District Court of Payne County, Oklahoma (R. 26, 27).

The said District Court, upon regular hearing, sustained the claim of the appellant (R. 68, 70) and directed the said appellee to order a refund to the appellant in the amount of $7,805.72, that being the amount of the tax levied on said oil and which had been paid at the time of the rendition of said judgment by the appellant under protest (R. 70).

From such judgment, the appellee herein, as further provided by the laws of the State, appealed to the Supreme Court of the State of Oklahoma.

The Supreme Court of Oklahoma, upon hearing, rendered its final decision May 17, 1932 (R. 89, 90), denying the contention of the appellant, and rendered judgment that said oil was subject to taxation for said year and that said tax imposed on said oil was valid. In the concluding paragraph of the opinion of the Supreme Court (R. 99) it was stated:

"There is no reason why the Indian Territory Illum-

inating Oil Company should not pay taxes upon this oil, as it enjoys the protection of the State government. There is neither defined exemption by positive law, or undefined exemption from rules of policy.

"The case is reversed, with directions to the court below to revoke its order directing the county commissioners to strike this property from the assessment roll, and requiring the Board of County Commissioners to order a refund of taxes paid under protest by the oil company in the aggregate of $7,805.72. The tax collecting authorities of Payne County are directed to take the necessary steps to collect the amount rebated with penalties in case the money has been returned to the oil company. The defendant in error will be taxed with the costs here and in the court below."

No petition for rehearing was filed in the said Supreme Court of the State of Oklahoma. The time within which such could have been filed in said State Supreme Court in this cause, had the appellant elected to file the same, expired June 21, 1932.

The Supreme Court of the State of Oklahoma is the highest Court of said State in which a decision of the suit can be had, and its decision and judgment aforesaid is final.

D.

CASES BELIEVED TO SUSTAIN JURISDICTION

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Jaybird Mining Company v. *Weir*, 271 U. S. 609;

Gellespie v. *State of Oklahoma*, 257 U. S. 501;

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282.

We respectfully submit that this Court has jurisdiction of this appeal.

Respectfully submitted,

JOHN H. MILEY,
Counsel for Appellant.

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NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, OKLAHOMA,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT OF PAPERS WHEREON APPEAL WAS ALLOWED AS PETITION FOR WRIT OF CERTIORARI

JOHN H. MILEY,
Counsel for Petitioner.

Unterbach Typesetting Co., Oklahoma City

SUBJECT INDEX

Page

I. The Opinions of the Courts Below 1

II. Jurisdiction 2

III. Statement of the Case 11

IV. Specification of Errors 12

V. Argument 16

Summary of Argument 11

Point B. The lessee of restricted Seminole land for oil and question of substance in a way not in accord with the applicable decisions of this Court 11

Point B. The lessee of restricted Seminole land for oil and gas mining purposes, under a lease executed pursuant to Sec. 2 of the Act of May 27, 1908 (Ch. 199, 35 Stat L. 312), with the approval of the Secretary of the Interior, is an agency or instrumentality of the Government of the United States. The lessee's share of the product as specified in the lease, as well as that of the Indian ward, produced from such land by virtue of the lease and under the supervision of the Secretary of the Interior is not subject to taxation by the state while held in storage in its original form prior to sale thereof by the lessee 11

TABLE OF CASES CITED

Board of County Commissioners of Payne County v. Indian Territory Illuminating Oil Company, 14 Pac. (2d) 929 1

Board of Equalization of Tulsa County v. Indian Territory Illuminating Oil Co., 13 Pac. (2d) 585 3

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292 ..... 6, 15

Citizens Nat. Bank of Cincinnati v. Durr, 257 U. S. 99 10

Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282 10

Dana v. Dana, 250 U. S. 220 10

Gillespie v. Oklahoma, 257 U. S. 501 ..... 5, 9, 15

Howard v. Oil Companies, 247 U. S. 503 ..... 6, 15

Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522 ..... 5, 15

Jaybird Mining Co. v. Weir, 271 U. S. 609 ..... 5, 9, 15

Large Oil Co. v. Howard, 248 U. S. 549 ..... 6, 15

McCulloch v. Maryland, 4 Wheat 316 ..... 6, 15

Table of Statutes Cited

	Page
Act of April 26, 1906, Chap. 1876 (34 Stat. 137)	6
Act of June 16, 1906, Chap. 3335 (34 Stat. 267)	6
Act of June 28, 1898, Chap. 517 (30 Stat. 567)	6
Act of May 27, 1908, Chap. 199 (35 Stat. 312)	4, 6, 15
Act of May 10, 1928, Chap. 517 (45 Stat. 495)	6
Compiled Oklahoma Statutes 1921, Chap. 84	6, 13
Section 9627	5, 13
Section 9666, as amended by Ch. 209, Session Laws of Oklahoma, 1927, p. 258	5, 13
Section 9814	5, 13
Sec. 237 (b) (c) of the Judicial Code, as amended by the Act of February 14, 1925. 43 Stat. 937	2, 10

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ON PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT OF PAPERS WHEREON APPEAL WAS ALLOWED AS PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below

The opinions of the courts below have not yet been officially reported. The opinion of the Supreme Court (the highest court of the State) is unofficially reported in *Board of Commissioners of Payne County* v. *Indian Territory Illuminating Oil Co.*, 14 Pac. Rep. (2nd Series) 929. The opinion is dated May 17, 1932, and is copied *in full* in the record (R. 90).*

*All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Oklahoma and on file in this Court. The record had not been printed at the time this brief was prepared.

II.

Jurisdiction

1. The statutory provisions believed to sustain the jurisdiction are Sec. 237 (b) (c) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. L. 937 (Sec. 344, U. S. C. A.), which read in part as follows (italics supplied to indicate provisions particularly applicable):

> "Sec. 237 (b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error (now appeal, Act of January 31, 1928, C. 14, Sec. 1, 45 Stat. 54), any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; *or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States;* and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to review on a writ of error (now appeal) in a case where such a right is conferred by the preceding paragraph; *nor shall the fact that a review on a writ of error* (now appeal) *might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.*
>
> "(c) If a writ of error (now appeal) be improvi-

dently sought and allowed under this section in a case where the proper mode of invoking a review is by petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error (now appeal) was allowed shall be regarded and acted on as a petition for certiorari, and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ or error (now appeal) was allowed * * *."

2. The date of the judgment to be reviewed is May 17, 1932 (R. 89), pursuant to the opinion of the Court filed the same day (R. 90). A petition for rehearing was not filed. The petition for appeal to this Court (R. 3), accompanied by an assignment of errors and a prayer for reversal (R. 9) was presented to the Chief Justice of the Supreme Court of Oklahoma on the 12th day of August, 1932, and appeal was allowed by him on that date (R. 13). Appeal bond was presented and approved on the same date (R. 15). Citation was issued on the 12th day of August, 1932 (R. 1), and duly served on the 23rd day of August, 1932 (R. 1). The transcript of the record of the Supreme Court of Oklahoma, including all the appeal papers, was lodged in the office of the Clerk of this Court on September 8, 1932.

3. The nature of the case and the ruling below are as follows:

The question involved in this case, which is virtually the same as the question involved in the case of *Indian Territory Illuminating Oil Co.* v. *Board of Equalization of Tulsa County, Oklahoma,* No. 356, now pending before this

Court, is whether 383,307 barrels of crude oil located in certain tanks in Payne County, State of Oklahoma, on January 1, 1928, were subject to assessment for ad valorem taxation by the taxing agencies of the State of Oklahoma and the municipalities thereof for the year 1928 (R. 32, 33).

The oil in question was produced by the petitioner (appellant) prior to January 1, 1928, from lands located in Seminole County, Oklahoma, owned by Seminole allottees, members of the Seminole tribe of Indians, as their individual allotments, from which restrictions against alienation imposed by Acts of Congress had not been removed (R. 32, 33, 54, 68, 70, 91, 97). The oil was produced by petitioner (appellant) under and pursuant to leases executed by the several allottees and approved by the Secretary of the Interior pursuant to the authority of the Act of Congress approved May 27, 1928 (35 Stat. L. 312), (R. 54, 68, 91, 97). The said oil so produced, together with other oil, was immediately after production piped into the storage tanks, where it has since remained in its original state. The said oil so produced by appellant had not been disposed of by it from the time of production thereof, until and throughout the entire tax period in question (R. 31-34, 54, 68, 91).

The assessing officers of the State of Oklahoma claim that such oil is subject to assessment for ad valorem taxation for the support of state government and the several political subdivisions thereof for the year 1928, by virtue of

certain statutes of the State of Oklahoma, particularly, to-wit: Section 9814, Compiled Oklahoma Statutes 1921, which imposes a gross production tax upon crude oil at the time of production, in lieu of any other tax thereon for the year in which it is produced, but which provides that:

> "* * * oil in storage * * * produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time."

Section 9627, C. O. S. 1921, provides that:

> "It shall be the duty of the * * * assessor * * * in which tanks * * * for the storage of crude petroleum are located to assess as other property is assessed to the proper owners at the fair cash value, as hereinbefore defined, any and all such tanks and the contents thereof."

And Section 9666, C. O. S. 1921, as amended by Chapter 209, Session Laws, Oklahoma, 1927, p. 258, provides:

> "The County Assessor shall on the 15th day of January of each year, proceed to take a list of all taxable property in the county and assess the value thereof as of January 1 * * *."

It is the contention of the petitioner (appellant) that it is an agency or instrumentality employed by the Government of the United States for the development and use of the restricted land of its Indian wards for their benefit (*Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Indian Territory Illuminating Oil*

Co. v. *Oklahoma,* 240 U. S. 522; *Large Oil Co.* v. *Howard,* 248 U. S. 549; *Howard* v. *Oil Companies,* 247 U. S. 503; *Choctaw O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *McCulloch* v. *Maryland,* 4 Wheat 316), and it is immune from taxation on such oil so produced and held in storage in its original state and that such statutes of the State of Oklahoma and other provisions of Ch. 84, C. O. S. 1921, relating to revenue and taxation, providing for assessment, levy and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma are invalid when applied to the crude oil in question, because repugnant to the Constitution, treaties, and laws of the United States.

The immunity from taxation and validity of the statutes of the State, as applied to the oil in question on the grounds aforesaid, was drawn in question at the inception of the proceeding and maintained throughout, and the final decision of the Supreme Court of the State of Oklahoma, from which this appeal was taken, was in favor of the validity of the statute as so applied.

The petitioner (appellant), in preparing and filing with the County Assessor its corrected assessment list or schedule of property located in Payne County, Oklahoma, claimed that notwithstanding said State statutes, the said oil was not subject to taxation under the Constitution, laws and treaties of the United States (30 Stat. L. 567; 34 Stat. L. 137; 35 Stat. L. 312; 45 Stat. L. 495; and 34 Stat. L. 267),

which claim was denied and the said property was added to the assessment roll as property subject to ad valorem taxation for the year 1928, and a tax of $7,805.72 was levied against said oil for said year (R. 28-31, 37, 70).

Thereupon the petitioner (appellant), as provided by the laws of the State of Oklahoma, paid the first half of said tax under protest (R. 63, 69), and thereafter duly filed in the office of the County Clerk (R. 26) its complaint wherein the appellant prayed that the Board of County Commissioners of Payne County, Oklahoma, the respondent (appellee) herein, issue its certificate in error cancelling and setting saide the tax levy on the crude oil as aforesaid and, further, that it order a refund to the petitioner of so much of the said tax on said oil as had been paid (R. 34, 35). After a hearing as provided by the laws of the State of Oklahoma, the respondent (appellee) denied the relief therein prayed for (R. 26), whereupon the petitioner (appellant), in accordance with the laws of the State of Oklahoma, duly appealed to the District Court of Payne County, Oklahoma (R. 26, 27).

The said District Court, upon regular hearing, sustained the claim of the petitioner (appellant) (R. 68, 70), and directed the said respondent (appellee) to order a refund to it in the amount of $7,805.72, that being the amount of the tax levied on said oil and which had been paid at the time of the rendition of said judgment by the petitioner (appellant) under protest (R. 70).

From such judgment, the respondent (appellee) herein, as further provided by the laws of the State, appealed to the Supreme Court of the State of Oklahoma.

The Supreme Court of Oklahoma, upon hearing, rendered its final decision May 17, 1932 (R. 89, 90), denying the contention of the petitioner (appellant), and rendered judgment that said oil was subject to taxation for said year, and that said tax imposed on said oil was valid. In the concluding paragraph of the opinion of the Supreme Court (R. 99) it was stated:

> "There is no reason why the Indian Territory Illuminating Oil Company should not pay taxes upon this oil, as it enjoys the protection of the State Government. There is neither defined exemption by positive law, or undefined exemption from rules of policy.
>
> "The case is reversed, with directions to the court below to revoke its order directing the county commissioners to strike this property from the assessment roll, and requiring the Board of County Commissioners to order a refund of taxes paid under protest by the oil company in the aggregate of $7,805.72. The tax collecting authorities of Payne County are directed to take the necessary steps to collect the amount rebated with penalties in case the money has been returned to the oil company. The defendant in error will be taxed with the costs here and in the court below."

The Supreme Court of the State of Oklahoma is the highest court of said State in which a decision of the suit can be had, and its decision and judgment aforesaid is final.

4. Counsel for petitioner was of the opinion that the question of the proper mode to invoke the jurisdiction to

secure a review of the case had been definitely settled and was ruled by *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, which involved the validity of an ad valorem tax assessed by the officials of the State under the same State statutes here involved, upon the product of the restricted land of an Indian pursuant to a lease executed by the Indian with the approval of the Secretary of the Interior. In that case this Court said in concluding the opinion:

> "In this case the lease was made to secure the development of the lands and obtain for the benefit of the restricted Indian owners a percentage of the gross proceeds of the ores to be mined. The ad valorem tax here in controversy was assessed on the ores in mass at the mine before sale, and that was an attempt to tax an agency of the Federal Government within the principle of the cases cited.
>
> "From abundance of caution the company presented a petition for a writ of certiorari; *but, as a writ of error lies* (now appeal) the petition will be denied. *Gillespie* v. *Oklahoma, supra,* 506 (66 L. ed. 341, 42 Sup. Ct. Rep. 171)."

The *Gillespie Case,* 257 U. S. 501, cited in the foregoing, involved the validity of a state tax upon the net income derived by a lessee of restricted Indian lands obtained from his share of the sale of oil and gas under such leases. The Supreme Court of the State had sustained the validity of the tax, and in reversing the decision on the ground that such income of an instrumentality of the United States was not subject to the tax, this Court concluded its opinion as follows:

> "*As a writ of error* (now appeal) *lies in this case* the petition for certiorari that was presented for greater caution will be denied. *Dahnke-Walker Mill Co.* v. *Bondurant,* December 12, 1921" (257 U. S. 282).

In *Dahnke-Walker Mill Co.* v. *Bondurant,* 257 U. S. 282, this Court considered the question at length, and held that a case was rightfully brought to this Court by writ of error (now appeal) where the state court applied and enforced to appellant's disadvantage a state statute (otherwise valid) which the appellant seasonably insisted as so applied and enforced was repugnant to the Constitution.

Since it now appears from the memorandum entered November 7, 1932, dismissing the appeal herein, that counsel has misinterpreted these decisions, it is respectfully submitted that although the validity of the state statutes under which the tax was imposed and sustained was not drawn in question, in their entirety, the jurisdiction to review by certiorari is conferred by that portion of Sec. 237 (b) as follows:

> "* * * or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States."

In the following cases involving claims of immunity from state taxation on Federal grounds, it was held that review might be had by certiorari:

Citizens Nat. Bank of Cincinnati v. *Durr,* 257 U. S. 99.

Dana v. *Dana,* 250 U. S. 220.

III.

Statement of the Case

The case has been rather fully stated in paragraph 3 under the heading "Jurisdiction."

The claim that the crude oil in question was exempt from taxation was made at the inception of the proceeding before the Board of County Commissioners. It was stated in the complaint to that board (R. 28, 32) as follows:

> "That the 212,210 barrels of crude oil shown as one of the items above set forth (added to the assessment list by the county assessor) is and was at the time the same was rendered and certified by the county assessor, oil produced from 'restricted Indian lands' from which all the interests of the Indians had not been disassociated; that in so producing said oil and conserving the same this complainant was acting under and by virtue of leases duly approved by the Secretary of the Interior and was functioning as a United States governmental instrumentality; and that by reason thereof said production so obtained is not subject to taxation by the State of Oklahoma under decisions of the United States Supreme Court" (R. 32).

The same claim was made with reference to the remainder of the oil involved (R. 33-34).

The case was tried in the State District Court on an agreed statement of facts (R. 54, 62).

The court found and concluded as follows:

> "The court finds that the oil, alleged and referred to in the complaint herein, amounting to 383,307 barrels was produced in Seminole County, Oklahoma, from land

belonging to restricted Indians, and thereafter stored in Payne County, Oklahoma, in steel storage tanks at the time when all property in said county was required to be assessed for taxation purposes during the tax year 1928. That 212,210 barrels of such oil valued for taxation purposes at $214,326 was stored in Eagle township, school district No. 91, Payne County, Oklahoma, and the remainder, 171,097 barrels valued at $169,386 was stored at such time in tanks in Eagle township, school district No. 102, Payne County, Oklahoma. That by reason of the fact that such oil was produced from the lands of restricted Indians, the said appellant was acting as a governmental instrumentality and therefore all of said oil was exempt from any and all forms of ad valorem taxation while stored in tanks in Payne County, Oklahoma'' (R. 68-69).

The Board of County Commissioners appealed to the Supreme Court of the State. That Court disagreed with the conclusion of law of the trial court. It held that there was no provision of the State Constitution or state statutes exempting this oil from taxation, and denied the claim of immunity from state taxation as an agency or instrumentality of the United States Government.

IV.

Specification of Errors

1. The Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Payne County, Oklahoma, and in holding and deciding that the said District Court of Payne County, Oklahoma, erred in holding that the property sought to be taxed in this cause was not

subject to ad valorem taxation for the year 1928, by the State of Oklahoma, or any political subdivision thereof.

2. The Supreme Court of the State of Oklahoma erred in refusing to affirm the judgment of the District Court of Payne County, Oklahoma.

3. The Supreme Court of the State of Oklahoma erred in holding, deciding and determining that Section 9574 and succeeding sections of Chapter 84, Compiled Oklahoma Statutes 1921, particularly Sections 9814, 9627 and 9614, which provide for the assessment, levy and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma during any given tax year are valid when applied to crude petroleum produced from the allotment of a restricted Seminole Indian in Seminole County, Oklahoma, by a lessee under a lease executed by such restricted allottee and duly approved by the Secretary of the Interior and while the oil so produced is still owned and held in storage in its original state and not disposed of by said lessee and in rendering a decision in favor of the validity of said statutes when applied to and construed to cover the property sought to be taxed in this cause, and in not holding under the facts in this cause that said statutes as so applied are repugnant to the Constitution, treaties and laws of the United States.

4. The Supreme Court of the State of Oklahoma erred in holding, deciding and determining that the acts of the

county assessor, the county treasurer and the Board of County Commissioners of Payne County, State of Oklahoma, and the authority exercised by them and each of them under, and the authority conferred and vested in them by, the said statutes of the State of Oklahoma mentioned specifically in assignment number three herein and above set forth, and other statutes of the State of Oklahoma authorizing the assessment of an ad valorem tax on the property involved in this cause for the period in question are valid and in rendering a decision in favor of their validity and in not holding said statutes and the authority so exercised by the officials aforesaid under said statutes repugnant to the Constitution, treaties and laws of the United States.

5. The Supreme Court of the State of Oklahoma erred in sustaining the above-mentioned statutes of the State of Oklahoma, authorizing the assessment, levy and collection of ad valorem tax on the crude oil involved in this case, said crude oil being held in storage unsold and in its original state throughout and during the entire tax period in question by the petitioner herein, and said crude oil having been by the petitioner produced solely under an oil and gas lease upon restricted Seminole lands under the control of Congress and the Secretary of the Interior.

6. The Supreme Court of the State of Oklahoma erred in its decision denying that the said crude oil produced by

the petitioner is and was exempt from ad valorem taxation as claimed by said petitioner under the Constitution, treaties and laws of the United States.

V.

Summary of the Argument

Point A: The State Supreme Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court, which decisions are as follows:

Jaybird Mining Co. v. *Weir*, 271 U. S. 609.
Gillespie v. *Oklahoma*, 257 U. S. 501.
Indian Territory Illuminating Oil Co. v. *Oklahoma*, 240 U. S. 522.
Large Oil Co. v. *Howard*, 248 U. S. 549.
Howard v. *Oil Companies*, 247 U. S. 503.
Choctaw O. & G. R. Co. v. *Harrison*, 235 U. S. 292.
McCulloch v. *Maryland*, 4 Wheat. 316.

Point B: The lessee of restricted Seminole Indian land for oil and gas mining purposes, under a lease executed pursuant to Section 2 of the Act of May 27, 1908 (Chapter 199, 35 Stat. L. 312), with the approval of the Secretary of the Interior, is an agency or instrumentality of the Government of the United States. The lessee's share of the product as specified in the lease, as well as that of the Indian ward, produced from such land by virtue of the lease and under the supervision of the Secretary of the Interior is not subject to taxation by the State while held in storage in its original form, prior to sale thereof by the lessee.

ARGUMENT

On the same day on which the opinion of the State Court in the instant case was rendered, an opinion was rendered by the same Court in a similar case, wherein the same question was involved as in the instant case. *Board of Equalization of Tulsa County* v. *Indian Territory Illuminating Co.*, 13 Pac. (2d) 585. The later case is now pending before this Court. (*Indian Territory Illuminating Oil Co.* v. *Board of Equalization of Tulsa Co.*, No. 356.) The argument given therein is fully applicable to the instant case, and as the two cases have thus far been considered together by this Court, to obviate unnecessary repetition, we respectfully refer to and adopt the argument advanced therein as the argument of the petitioner in the instant case.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that if this Court has not jurisdiction to review the decision of the Supreme Court of Oklahoma by appeal, that to such an end a writ of certiorari should be granted, and the decision finally reversed.

JOHN H. MILEY,
Counsel for Petitioner.

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NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY,
STATE OF OKLAHOMA,
Appellee.

STATEMENT OPPOSING JURISDICTION ON APPEAL

ERNEST F. JENKINS,
Counsel for Appellee.

Utterback Typesetting Co., Oklahoma City

NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY,
STATE OF OKLAHOMA,
Appellee.

STATEMENT OPPOSING JURISDICTION ON APPEAL

May It Please the Court:

The appellee, in opposing the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

STATUTORY PROVISIONS BELIEVED TO OPPOSE THE JURISDICTION

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. at L. 936, 937 (United States Code, Title 28, Section 344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "Sec. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the

validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

B.

NATURE OF CASE

It is the contention of the appellee that such statutes of the State of Oklahoma and other provisions of Ch. 84, C. O. S. 1921, relating to Revenue and Taxation, providing for the assessment, levy, and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma are valid when applied to the crude oil in question, and not repugnant to the Constitution, treaties, and laws in the United States.

The appellant relies upon the theory of a governmental agency, as distinguished from the idea of interfering with a property tax upon that which has been derived from such property and its ownership transferred to a corporation, and has become a part of the mass of property of the citi-

zens of the state. However, the idea of a governmental agency, as applied to the oil in this case, can well be extended both forward and backward. If extended backward, when the Government, with like duties owing to its Indian wards, allowed certain classes to make their own contracts, without supervision of the Government, and allowed the share of the Indian land owner and the share of the product belonging to the operator, produced as result of labor in extraction, each to be subject to state tax, while the operator's share, working on restricted land, is exempt, equally in burden bearing no longer exists. The operator on the restricted land has the advantage. The enabling act requires, that the State Constitution shall "make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The Supreme Court of the United States in *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 72 L. ed. 709, had for consideration the question again, and after the Jaybird Mining Company case was passed on. In that case the Secretary of the Interior had, with restricted funds, bought property which was conveyed to an allottee by deed carrying restrictions against alienation. It was leased out under the supervision of the Secretary, and there was production of oil. Elaborate briefs were filed in the case, and the court, in discussing the matter, after enumerating some of the de-

cisions and the statutory requirements, concludes the opinion as follows:

> "Little need be said as to the power of the Secretary of the Interior to exempt the land and its uses from taxation. The power, if it exists, is one conferred by Congress, but neither it nor the Secretary has in terms purported to make or authorize such an exemption.
>
> "The Act of May 27, 1908, contains no express exemption from taxation of the proceeds of restricted lands, but Sec. 4 expressly subjects lands from which restrictions have been removed to state taxation. This section was adopted in response to representations that the revenue of the State of Oklahoma was insufficient for state purpose, that large areas of lands within the state allotted to Indians were exempt from taxation as agencies of the Federal Government and that Indian citizens were enjoying the benefit of local government without taxation. Report of the Senate Committee on Indian Affairs, S. Rep. No. 575, 60th Cong. 1st Sess; Report of the House Committee on Indian Affairs, H. Rep. No. 1454, 60th Cong. 1st Sess.
>
> "At the time of this legislation restrictions on some allotted lands had been removed by reason of the expiration of the restricted period. There were also allotments on behalf of allottees dying before allotment which in the hands of their heirs were unrestricted. See *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578. It cannot be assumed that Congress at a time when it was withdrawing allotted lands from their former exemption in order that Indian citizens might assume the just burdens of state taxation, intended to extend a tax exemption by implication. In any case the Secretary of the Interior has never, by rule or regulation or other action, purported to exempt such lands from state taxation. No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land. See *U. S.* v. *Ransom*, 263

U. S. 691, 68 L. ed. 508, 44 Sup. Ct. Rep. 230, affirming (C. C. A. 8th) 284 Fed. 108; *U. S.* v. *Brown* (C. C. A. 8th), 8 Fed. (2nd) 564; *U. S.* v. *Gray* (C. C. A. 8th), 284 Fed. 103; *U. S.* v. *Nummert* (C. C. A. 8th), 15 Fed. (2nd) 926."

Quoting from the case *Central Coal & Coke Co.* v. *Carseloway, Co. Assessor*, 45 Fed. (2nd) 744, decided by the Circuit Court of Appeals for the 10th Circuit, as follows:

> "It is clear that the plaintiffs own properties of large value, situated in Oklahoma. Their ownership is secure because Oklahoma maintains a stable government. If plaintiffs need not contribute to the maintenance of that government, while enjoying the benefits thereof, some all-sufficient reason should appear."

C.

CASES BELIEVED TO OPPOSE JURISDICTION

The following decisions of this Court are believed to oppose the jurisdiction of this appeal:

Shaw v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575.

Central Coal & Coke Co. v. *Carseloway, Co. Assessor*, 45 Fed. (2nd) 744.

We respectfully submit that this Court has no jurisdiction of this appeal.

Respectfully submitted,

ERNEST F. JENKINS,
Counsel for Appellee.

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NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932.

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, STATE OF OKLAHOMA,
Appellee.

BRIEF AND STATEMENT OPPOSING JURISDICTION OF PETITION FOR WRIT OF CERTIORARI

ERNEST F. JENKINS,
Counsel for Appellee.

Utterback Typesetting Co., Oklahoma City

INDEX

	PAGE
Statement	1
A. Statutory Provisions Believed to Oppose the Jurisdiction	1
B. Nature of Case	4
C. Cases Believed to Oppose Jurisdiction on Two Grounds	7

AUTHORITIES

Act of February 13, 1925, Section 8	1
Supreme Court Rules, Rule 38, Par. 2	2
Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, at 418	2, 7
Rust Land Co. v. Jackson, 250 U. S. 71	2, 7
Act of February 13, 1925, Ch. 229, Sec. 1, 13 Stat. at L. 936-937	3
C. O. S. 1921, Ch. 84	4
Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 72 L. ed. 709	5, 7
Central Coal & Coke Co. v. Carseloway, Co. Assessor, 45 Fed. (2d) 744	7

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In the Supreme Court of the United States

OCTOBER TERM, 1932.

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, STATE OF OKLAHOMA,
Appellee.

BRIEF AND STATEMENT OPPOSING JURISDICTION OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The appellee, in opposing the jurisdiction of this Court to review the above entitled cause on writ of certiorari, respectfully represents:

A.

Statutory Provisions Believed to Oppose the Jurisdiction

Section 8 of the Act of Congress of February 13, 1925, provides in part as follows:

> "That no * * * writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review, shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor

is made within six months; *provided,* that for good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a Justice of the Supreme Court."

Paragraph 2, Rule 38, Rules of the Supreme Court, provides:

> "The petition will be deemed in time when it, the printed record, and the supporting brief, are filed with the Clerk within the period prescribed by Section 8 of the Act of February 13, 1925."

The Supreme Court of the United States has held that it has no power to review by certiorari a final judgment or decree of either a State or a Federal Court after the expiration of the period fixed by statute.

> *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, at 418.
> *Rust Land Co.* v. *Jackson,* 250 U. S. 71.

By the terms of the above quoted Section 8 (a), the time within which to apply for writ of certiorari may be extended not exceeding sixty days *only* by a Justice of the Supreme Court. In case on appeal to the Supreme Court of the United States, the time within which to docket the case in that Court—though not the time within which to apply for the allowance of the appeal—may be extended, as well by the judge or justice of the court appealed from, as by a Justice of the Supreme Court of the United States; but on petition for a certiorari the extension of time within which to apply for the writ may be granted only by a Justice of the Federal Supreme Court.

The opinion of the lower court is dated May 17, 1932, and is copied in full on the record (R. 90).

The date of the judgment to be reviewed is May 17, 1932 (R. 89).

On June 1, 1932, the acting Chief Justice of the Supreme Court of Oklahoma granted an extension of time of twenty days within which to file a petition for rehearing.

On June 10, 1932, the acting Chief Justice of the Supreme Court of Oklahoma stayed its mandate in said case for a period of sixty days.

On August 8, 1932, the Chief Justice of the Supreme Court of Oklahoma made an order staying its mandate until August 15, 1932. These three orders are perhaps set up in the record, but the page numbers of the same are unknown to the respondent, and cannot be ascertained at said time, as we do not have access to the said record.

The transcript of the record of the Supreme Court of Oklahoma, including all the appeal papers, was lodged in the office of the Clerk of this Court on September 8, 1932, and therefore filed out of time and should be dismissed for want of jurisdiction on above authorities.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat at L. 936, 937 (United States Code, Title 28, Section 344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

"Sec. 237 (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."'

B.

Nature of Case

It is the contention of the appellee that such statutes of the State of Oklahoma and other provisions of Chapter 84, C. O. S. 1921, relating to Revenue and Taxation, providing for the assessment, levy, and collection by the State of Oklahoma and political subdivisions thereof of an ad valorem tax on all property situated in the State of Oklahoma are valid when applied to the crude oil in question, and not repugnant to the Constitution, treaties, and laws in the United States.

The appellant relies upon the theory of a governmental agency, as distinguished from the idea of interfering with a property tax upon that which has been derived from such property and its ownership transferred to a corporation,

and has become a part of the mass of property of the citizens of the State. However, the idea of a governmental agency, as applied to the oil in this case, can well be extended both forward and backward. If extended backward, when the Government, with like duties owing to its Indian wards, allowed certain classes to make their own contracts, without supervision of the Government, and allowed the share of the Indian landowner and the share of the product belonging to the operator, produced as result of labor in extraction, each to be subject to state tax, while the operator's share, working on restricted land, is exempt, equality in burden bearing no longer exists. The operator on the restricted land has the advantage. The enabling act requires, that the State Constitution shall "make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The Supreme Court of the United States in *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 72 L. ed. 709, had for consideration the question again, and after the Jaybird Mining Company case was passed on. In that case the Secretary of the Interior had, with restricted funds, bought property which was conveyed to an allottee by deed carrying restrictions against alienation. It was leased out under the supervision of the Secretary, and there was production of oil. Elaborate briefs were filed in the case, and the Court, in discussing the matter, after enumerating some of

the decisions and the statutory requirements, concludes the opinion as follows:

> "Little need be said as to the power of the Secretary of the Interior to exempt the land and its uses from taxation. The power, if it exists, is one conferred by Congress, but neither it nor the Secretary has in terms purported to make or authorize such an exemption.
>
> "The Act of May 27, 1908, contains no express exemption from taxation of the proceeds of restricted lands, but Sec. 4 expressly subjects lands from which restrictions have been removed to state taxation. This section was adopted in response to representations that the revenue of the State of Oklahoma was insufficient for state purpose, that large areas of lands within the state allotted to Indians were exempt from taxation as agencies of the Federal Government and that Indian citizens were enjoying the benefit of local government without taxation. Report of the Senate Committee on Indian Affairs, S. Rep. No. 575, 60th Cong., 1st Sess; Report of the House Committee on Indian Affairs, H. Rep. No. 1454, 60th Cong., 1st Sess.
>
> "At the time of this legislation restrictions on some allotted lands had been removed by reason of the expiration of the restricted period. There were also allotments on behalf of allottees dying before allotment which in the hands of their heirs were unrestricted. See *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578. It cannot be assumed that Congress at a time when it was withdrawing allotted lands from their former exemption in order that Indian citizens might assume the just burdens of state taxation, intended to extend a tax exemption by implication. In any case the Secretary of the Interior has never, by rule or regulation or other action, purported to exempt such lands from state taxation. No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land. See *U. S.* v. *Ransom*, 263 U. S. 691, 68 L.

ed. 508, 44 Sup. Ct. Rep. 230, affirming (C. C. A. 8th) 284 Fed. 108; *U. S.* v. *Brown* (C. C. A. 8th), 8 Fed. (2d) 564; *U. S.* v. *Gray* (C. C. A. 8th), 284 Fed. 103; *U. S.* v. *Nummert* (C. C. A. 8th), 15 Fed. (2d) 926."

Quoting from the case *Central Coal & Coke Co.* v. *Carseloway, Co. Assessor,* 45 Fed. (2d) 744, decided by the Circuit Court of Appeals for the Tenth Circuit, as follows:

> "It is clear that the plaintiffs own properties of large value, situated in Oklahoma. Their ownership is secure because Oklahoma maintains a stable government. If plaintiffs need not contribute to the maintenance of that government, while enjoying the benefits thereof, some all-sufficient reason should appear."

C.

Cases Believed to Oppose Jurisdiction on Two Grounds

First: Petition for writ of certiorari is out of time.

Todelo Scale Co. v. *Computing Scale Co.,* 261 U. S. 399, at 418.
Rust Land Co. v. *Jackson,* 250 U. S. 71.

Second: Said matter does not involve a federal question.

Shaw v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575.
Central Coal & Coke Co. v. *Carseloway, Co. Assessor,* 45 Fed. (2d) 744.

We respectfully submit that this Court has no jurisdiction of this case on a writ of certiorari, and that the same should be dismissed.

Respectfully submitted,

ERNEST F. JENKINS,
Counsel for Appellee.

FILE COPY

NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932

INDIAN TERRITORY ILLUMINATING OIL COMPANY,
Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, STATE OF OKLAHOMA
Appellee.

SUPPLEMENTAL BRIEF OF THE APPELLEE

ERNEST F. JENKINS,
GUY L. HORTON,
Counsel for the Appellee.

NO. 357

In the Supreme Court of the United States

OCTOBER TERM, 1932

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Appellant,

vs.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, STATE OF OKLAHOMA
Appellee.

SUPPLEMENTAL BRIEF OF THE APPELLEE

ARGUMENT

Appellant in this case claims that the oil in question is exempt from a state ad valorem taxation, on the theory that to tax such oil would be taxation of a governmental instrumentality.

Several cases are cited to sustain such contention, two of which are given considerable emphasis, the cases of *Gillespie* v. *State of Oklahoma*, 257 U. S. 501, and *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609.

The above cases are not in point in fact with the case at bar, but are considered analagous by the appellant. If either are analagous, we consider the Gillespie case more so. Therein it was held that the lessee's income derived from the sale of his share of the oil and gas from a lease on restricted Indian land, was exempt on the theory that to tax the same would constitute taxation of a government instrumentality. In the present case, it is sought to tax the lessee's share of the oil produced on a restricted Indian lease, the Indian given his share, and that belonging to the appellant being removed more than a hundred miles away, mixed and stored with other and similar oil. We think it is important to mark the physical segregation, the fact that the oil was so moved, mixed and stored, before being assessed for ad valorem taxation.

We believe to apply the doctrine of the Gillespie case to the present case would be to further enlarge the same, and it has been said by this court in the case of *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, in an opinion by Mr. Justice McReynolds:

> "We are disposed to apply the doctrine of *Gillespie* v. *Oklahoma* strictly and only in circumstances closely analagous to those which it disclosed."

In the same case Mr. Justice Stone wrote a dissenting opinion, concurred in by three other members of the court in which he said he believed the Gillespie case should be overruled.

In the Case of Group No. 1 *Corporation* v. *Bass*, 283 U. S. 279, a later case than the Gillespie case, supra, the facts were as follows: The appellant oil company owned leases obtained from the State of Texas on land belonging to the public do-

main, set aside for the support of the university. The law of Texas regarding oil leases is that such a lease upon execution amounts to a present sale of the oil and gas in place. Oil was produced from the lease, and income taxes were sought to be collected from the income therefrom by the Federal government. This court held that such income was subject to taxation, and such taxation did not amount to the taxation of a governmental instrumentality, on the theory that as the state law considered the execution of the oil lease as a sale of the oil in place, the tax was on income from the private property of the appellant.

We see little distinction between that case and the case at bar. It is true that the same construction on the status of the ownership of the oil after execution of the lease does not exist in Oklahoma as in Texas, but the same principle applied in that case will apply in the case at bar. In Oklahoma the rule as stated in *Kolachy* v. *Galbreath*, Oklahoma Reports, 110 Pac. 902, is:

> "Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas is not therefore, a grant of the oil that is in the ground, but such a part as may be found by the grantee."

In Texas the lessee is the theoretical owner of all the oil beneath the land covered by the lease. In Oklahoma, he is the actual owner of all he can get to the surface. It becomes the lessee's personal property when he reduces it to his possession. If to tax the oil, or the income from such oil, produced under the Texas lease, would not amount to the taxation of a gov-

ernmental instrumentality, in logic how could such be the case in Oklahoma? Under both leases a royalty must be paid, and a purchase price for the lease. In Oklahoma, most certainly, where the lessee takes the oil, segregates its share from the Indian's, moves it one hundred twenty miles away, mixes it with its other oil, it becomes their personality, subject to ad valorem taxation, and becomes exactly analagous to the Texas case.

The case of *Jaybird Mining Company* v. *Weir,* 271 U. S. 609, 70 L. Ed. 1112, 46 S. C. R. 592, is a case originating in this State and involves an entirely different state of facts than exists here. In the Jaybird Mining Company case, supra, the ore sought to be taxed was mined from land owned by a restricted Indian, and at the time it was attempted to be assessed for taxation, such ore was in the bins at the mine and on the property where it was produced in mass. The Supreme Court of the United States does not attempt to say that the lessees share thereof is exempt from taxation, but does say (Syllabus 3):

"Where the interests have not been segregated" and "Where produced and in bins on the land on January 1, 1921" (Body of opinion) it was exempt from taxation." Such does not enlarge the doctrine in the Gillespie case, supra.

If we should follow the theory and contention of the Company to its logical conclusion, and hold that this oil was exempt from taxation so long as it was in the possession of the Company which produced it from the land of restricted Indians, then, and in that event, if they should refine the oil into various by-products: gasoline, grease, kerosene, etc., it

would be exempt from taxation so long as it remained in the possession of the Company. This theory is untenable, not supported by law, and contrary to any principles of natural justice and equality in matters of taxation.

The most that we can make out of the decision in the Jaybird Mining Company case, supre, is that the oil produced on this lease by the lessee while acting as a government instrumentality would be exempt from taxation while stored in flow-tanks upon the lease, and before the interests of the lessor had been disposed of, or segregated from the mass.

Referring to the Group No. 1 Oil Corporation v. Bass case, supra, it was said:

> "Property which has thus passed (speaking of theoretical sale of oil in place under Texas lease) from either the state or national government to private ownership becomes a part of the common mass of property and subject to its common burdens * * * (Speaking of Indian Lease cases) but no case has extended such immunity to property, real or personal, or income derived from its sale where it has passed to the buyer by a completely executed act of sale, without restriction, and no interest has been retained for the benefit of the Indian.

While there was no sale in this case, the appellant in the end, as in the above case, secured possession of the oil. Here it segregated its interest and took it away from the lease and commingled it with other of its oil, where the Indian had no interest left. How would taxing the same impede the governmental instrumentality? Must the State segregate it again so it can tax that produced from other sources?

Quoting from a note at the bottom of the page 595, 46 S. C. R., in the case of *Jaybird Mining Co.* v. *Weir:*

> "It is therefore manifest that exemption of federal agencies from State taxation is dependent not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they were agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform."

Quoting from Justice Kornegay's opinion in the Oklahoma Court:

> "When one analyzes the cases that are relied upon in the *Jaybird Mining Company* v. *Weir* case for the exemption thereof, he will find that they all go back to the original case of *Choctaw, Oklahoma & Gulf Ry. Co.* v. *Harrison* 235 U. S. 292 59 L. ed 234." The opinion says:
>
> > "The lessee is an agency or instrumentality employed by the government for the development and use of the restricted land, and to mine ores therefrom, for the benefit of its ward."
>
> "And the case of *Choctaw, Oklahoma & Gulf Ry. Co.* v. *Harrison,* cited above, is cited and relied on. In the Harrison case, it was held that the tax complained of was an occupational tax which entirely distinguishes said case from the Jaybird Mining Company case, and from the case now before the bar of this Court. With that as a basis, most of the decisions since have been pronounced, and the Jaybird Mining Company case is an extension of that idea beyond its normal expanse, as it would seem from the dissenting opinions filed therein.
>
> On the whole, these cases seem to be based largely upon the idea of a governmental agency helping one class of Indians protect themselves as against the greed of their fellows, as distinguished from the idea of interfering with a property tax upon that which has been derived from such property and its ownership transferred to a corporation, and has become a part of the mass of property of the citizens of the State. However, the idea of govern-

mental agency, as applied to the oil in this case, can well be extended both forward and backward. If extended backward, when the government, with like duties owing to its Indian wards, allowed certain classes to make their own contracts, without supervision of the government, and allowed the share of the Indian land owner and the share of the product belonging to the operator, produced as a result of labor in extraction, each to be subject to state tax, while the operators' share, working on restricted land, is exempt, equality in burden bearing no longer exists. The operator on the restricted land has the advantage. The enabling act requires, that the State Constitution shall "make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

We think the taxation of the oil in this case consists merely of the taxation of the property of the appellant. The tax will in no way impede the operation of the lease from which the oil was originally secured. The influence is too remote. *Central P. R. Co.* v. *California*, 162, U. S. 91. The tax is the same charged all competitors of the appellant and the appellant itself on oil produced from all other sources. It is a tax upon the property of the appellant, reduced to its possession, and not upon the operation of the lease or instrumentality of the government.

If the appellant wins its contention in this case as Justice Kornegay has pointed out in the lower court, it could erect a refinery in which nothing was used but oil from restricted Indian lands, and dispose of the gasoline so produced, tax free.

There is no reason why the Indian Territory Illuminating Oil Company should not pay its taxes upon this oil as it enjoys the protection of the State government. There is neither de-

fined exemption by positive law, nor undefined exemption from rules of policy, and it would be unfair to other competitors in the production of oil in the State of Oklahoma to say that this corporation, the appellant herein, is exempt from taxation just because the oil that they had in tanks in Payne County on January 1, 1928, had, sometime prior to that time, been taken from restricted Indian land under a lease approved by the Secretary of the Interior.

Respectfully submitted,

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GUY L. HORTON,
Counsel for the Appellee.

SUPREME COURT OF THE UNITED STATES.

Nos. 356 and 357.—October Term, 1932.

Indian Territory Illuminating Oil Company, Petitioner, 356 *vs.* Board of Equalization of Tulsa County, Oklahoma. Indian Territory Illuminating Oil Company, Petitioner, 357 *vs.* Board of County Commissioners of Payne County, Oklahoma.	On Writs of Certiorari to the Supreme Court of the State of Oklahoma.

[February 13, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

These cases present the question of the validity of *ad valorem* taxes upon crude oil belonging to petitioner, Indian Territory Illuminating Oil Company, and held by it in its storage tanks in Tulsa County and Payne County, Oklahoma. In each case, the tax was challenged upon the ground that the oil was exempt because in its production petitioner was operating as an instrumentality of the United States. The Supreme Court of Oklahoma sustained the taxes (13 Pac. (2d) 585; 14 Pac. (2d) 929); and the cases come here on writs of certiorari. 287 U. S. —.

The facts are shown by agreed statements. The oil in question was assessed under the general laws of the State for annual *ad valorem* taxes as a part of the personal property of petitioner within the respective counties. It constituted petitioner's share of oil which petitioner had produced from restricted Indian lands in Seminole County, Oklahoma, under leases which had been approved by the Secretary of the Interior pursuant to the Act of Congress of May 27, 1908, 35 Stat. 312. In the *Tulsa County* case (No. 356) the assessment was for the year 1929 and included

51,630 barrels of crude oil which had been produced from the restricted lands above mentioned during the period from March 31, 1927, to June 16, 1927. This oil on production had been commingled with oil from petitioner's "commercial" or unrestricted leasehold properties in Seminole County and had been immediately piped into petitioner's storage tanks in Tulsa County where it had remained. At the time of the removal of the oil, petitioner paid to the Superintendent of the Five Civilized Tribes for the lessors the agreed royalty of 12½ per cent of the gross proceeds, and the Indians owned no part of the oil in storage on January 1, 1929, the date of assessment, nor will they receive any part of the proceeds when the oil is sold by petitioner. In the *Payne County* case (No. 357) the question concerns 383,307 barrels of crude oil produced from the restricted lands prior to January 1, 1928 (the assessment date) and piped, with other oil, into petitioner's storage tanks in Payne County and there held.

In *Jaybird Mining Company* v. *Weir*, 271 U. S. 609, an *ad valorem* tax upon ores mined under a lease of restricted Indian land and in the bins on that land on the assessment date was held to be invalid. The tax "was assessed on the ores in mass; and the royalties or equitable interests of the Indians had not been paid or segregated". *Id.* p. 612. In these circumstances the tax was regarded as an attempt to tax an agency of the federal government. That decision is not controlling in the instant case. Here, payment had been made for the share of the Indian lessors and they had no further interest in the oil. It had been commingled with other oil, had been transported from the restricted lands to petitioner's storage tanks in the taxing counties, and was there held exclusively in the interest and for the convenience of petitioner.

There is a recognized distinction between a non-discriminatory tax upon the property of an agent of government, albeit the property is used in, or has relation to, the business of the agency—where there is only a remote, if any, influence upon the exercise of the functions of government—and a tax which is deemed to impose a direct burden upon the exertion of governmental powers. *McCulloch* v. *Maryland*, 4 Wheat. 316, 436; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 590; *Railroad Company* v. *Peniston*, 18 Wall. 5, 33, 36; *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375,

382; *Choctaw, O. & G. R. R. Co.* v. *Mackey,* 256 U. S. 531, 536; *Willcuts* v. *Bunn,* 282 U. S. 216, 225, 226; *Susquehanna Power Co.* v. *Tax Commission (No. 1),* 283 U. S. 291, 294; *Fox Film Corporation* v. *Doyal,* 286 U. S. 123, 130; *Broad River Power Co.* v. *Query,* decided February 6, 1933. In this instance, the tax is not on the oil leases (*Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, 530), or upon the privilege of extracting the oil or upon the income derived therefrom. *Choctaw & Gulf R. R. Co.* v. *Harrison,* 235 U. S. 292, 298, 299; *Gillespie* v. *Oklahoma,* 257 U. S. 501, 506. See *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 399. Such immunity as petitioner enjoyed as a governmental instrumentality inhered in its operations as such, and being for the protection of the Government in its function extended no further than was necessary for that purpose. The holding of the oil in question, which had been segregated and withdrawn from the restricted lands as petitioner's exclusive property, awaiting disposition at petitioner's pleasure, was for its sole advantage and cannot be said to be so identified with its operations as a governmental instrumentality as to entitle it to exemption from the general property taxes imposed by the State in return for the protection the State afforded. With respect to these taxes, this oil was in no different case from that of the other oil of petitioner with which it was commingled.

Judgments affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.